(3)

No. 96-1971

In The

Supreme Court of the United States

October Term, 1997

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, and EDMOND G. MIRANNE, JR.,

versus

Petitioners,

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, and FOUNTAINBLEAU STORAGE ASSOCIATES,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed June 11, 1997
Certiorari Granted September 29, 1997

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RELEVANT DOCKET ENTRIES

APPEAL TERMED
MAG-1

U.S. District Court
USDC for the Eastern District of Louisiana (New Orleans)

CIVIL DOCKET FOR CASE #: 95-CV-426

Rivet, et al v. Regions Bk of LA, et al Filed: 02/03/95
Assigned to:
Judge Charles Schwartz, Jr. Jury demand: Plaintiff
Demand: $0,000 Nature of Suit: 220
Lead Docket: None Jurisdiction: Diversity
Dkt # in CDC Orleans Parish: is 94-20050"H"

Cause: 28:1441 Petition for Removal – Insurance Contract

MARY ANNA RIVET plaintiff	John Gregory Odom [COR LD NTC] Stuart E. DesRoches [COR] Law Offices of John Gregory Odom 201 St. Charles Ave. 35th Floor, Place St. Charles New Orleans, LA 70170-3500 (504) 522-0077
MINNA REE WINER plaintiff	John Gregory Odom (See above) [COR LD NTC] Stuart E. DesRoches (See above) [COR]

EDMOND G MIRANNE plaintiff	John Gregory Odom (See above) [COR LD NTC] Stuart E. DesRoches (See above) [COR]
EDMOND G MIRANNE, Jr. plaintiff	John Gregory Odom (See above) [COR LD NTC] Stuart E. DesRoches (See above) [COR]

v.

REGIONS BANK OF LOUISIANA, F.S.B. defendant	John M. Landis (504) 581-3200 [COR LD NTC] Stephanie D. Shuler [COR] Stone, Pigman, et al 546 Carondelet St. New Orleans, LA 70130-3588 (504) 581-3200
WALTER L BROWN, JR defendant	Charles R. Penot, Jr. [COR LD NTC] McGlinchey, Stafford, et al 643 Magazine St. New Orleans, LA 70130 (504) 586-1200

	Michael H. Rubin (504) 383-1400 [COR NTC] McGlinchey, Stafford & Lang One American Place 9th Floor Baton Rouge, LA 70825 (504) 383-9000
PERRY S BROWN defendant	Charles R. Penot, Jr. (See above) [COR LD NTC]
	Michael H. Rubin (See above) [COR NTC]
FOUNTAINBLEAU STORAGE ASSOCIATES defendant	Charles Louis Stern, Jr. [COR LD NTC] Richard Thomas Gallagher [COR] Steeg & O'Connor 201 St. Charles Ave. Suite 3201 – Place St. Charles New Orleans, LA 70170 (504) 582-1199

2/3/95	1	Notice of removal by defendant Regions Bk of LA, defendant Walter L Brown Jr, defendant Perry S Brown from Civil District Court, Parish of Orleans; Case Number: 94-20050"H" (sw) [Entry date 02/07/95]
2/3/95	–	Payment of filing fee by defendant Regions Bk of LA, defendant Walter L Brown Jr, defendant Perry S Brown, defendant Fountainbleau in amount of $ 120.00 (sw) [Entry date 02/07/95]
2/3/95	2	Notice by defendant Regions Bk of LA, defendant Fountainbleau of related case 84-6127"A" (sw) [Entry date 02/07/95]
2/7/95	3	MINUTE ENTRY 2/7/95: Case reassigned to Judge Charles Schwartz Jr. by Judge Stanwood R. Duval Jr. (sw) [Entry date 02/08/95]
2/7/95	4	ANSWER by defendant Fountainbleau to complaint and Counterclaim of same against plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr (rg) [Entry date 02/09/95]
2/14/95	5	ANSWER by defendant Walter L Brown Jr, defendant Perry S Brown to complaint by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr [1-1] (rg) [Entry date 02/15/95]

2/23/95	6	Motion by defendant Fountainbleau and ORDER for leave to file contents of state court record; by Judge Charles Schwartz Jr. Date Signed: 2/24/95 (rg) [Entry date 02/27/95]
2/23/95	–	RETURN OF SERVICE of summons and complaint upon defendant Perry S Brown on 2/1/95 (STATE COURT) (rg) [Entry date 02/27/95]
2/23/95	–	RETURN OF SERVICE of summons and complaint upon defendant Walter L Brown Jr on 2/7/95 (STATE COURT) (rg) [Entry date 02/27/95]
2/27/95	7	MOTION by defendant Regions Bk of LA for summary judgment to be heard before the Judge at 10:00 3/22/95 (rg)
3/6/95	8	MOTION by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to remand to Civil District court for the parish of Orleans to be heard before the Judge at 10:00 3/22/95 (rg)
3/6/95	9	MOTION by defendant Walter L Brown Jr, defendant Perry S Brown for summary judgment to be heard before the Judge at 10:00 3/22/95 (rg)
3/6/95	11	Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to reset hrg on dfts mtn for sum jgm and UNSIGNED ORDER for same. (rg) [Entry date 03/13/95]

3/7/95	10	Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to reset hrg on dft's mtn for sum jgm and UNSIGNED ORDER. (rg) [Entry date 03/13/95]
3/10/95	12	MINUTE ENTRY (3/10/95): IT IS ORDERED that the dfts Regions Bank, Walter Brown, Jr. and Perry Brown motion for summary judgment [9-1] are CONT & RESET FOR 10:00 4/5/95. IT IS FURTHER ORDERED that the pla's motion to remand to Civil District court for the parish of Orleans [8-1] is CONT AND RESET FOR HRG at 10:00 4/5/95, setting motion for summary judgment [7-1] at 10:00 4/5/95; by judge Charles Schwartz Jr. (rg) [Entry date 03/13/95]
3/21/95	13	MOTION by defendant Fountainbleau for summary judgment to be heard before Judge at 10:00 4/5/95 (gw)
3/28/95	14	Memo in opposition by defendant Regions Bk of LA to motion to remand to Civil District court for the parish of Orleans [8-1] filed by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr (plr)
3/28/95	15	Memo in opposition by defendant Walter L Brown Jr, defendant Perry S Brown, defendant Fountainbleau to motion to remand to Civil District court for the parish of Orleans [8-1] filed by plaintiffs (cbn) [Entry date 03/30/95]

3/28/95	16	Memo in opposition by plaintiffs to motion for summary judgment [13-1], motion for summary judgment [9-1], motion for summary judgment [7-1] filed by defendants (cbn) [Entry date 03/30/95]
3/31/95	17	Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr and ORDER for leave to file their reply memo in support of mtn to remand; by Judge Charles Schwartz Jr. Date Signed: 4/3/95 (rg) [Entry date 04/05/95]
4/4/95	18	Reply Memo by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr to dfts' response & in support of their motion to remand to Civil District court for the parish of Orleans [8-1] (rg) [Entry date 04/05/95]
4/4/95	19	Motion by defendant Walter L Brown Jr, defendant Perry S Brown and ORDER for leave to file their reply brief to pla's response to their mtn to remand & sum jgm; by Judge Charles Schwartz Jr. Date Signed: 4/5/96 (rg) [Entry date 04/06/95]
4/4/95	21	Motion by defendant Regions Bk of LA and ORDER for leave to file their Reply Memo in support of mtn for sum jgm; by Judge Charles Schwartz Jr. Date Signed: 4/6/95 (rg) [Entry date 04/10/95]

4/4/95	23	Motion by defendant Fountainbleau and ORDER for leave to file their suppl memo in support of mtn for sum jgm; by Judge Charles Schwartz Jr. Date Signed: 4/6/95 (rg) [Entry date 04/10/95]
4/5/95	25	Motion by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr and ORDER for leave to file 3 addl exhibits in opp to the mtns for sum jgm filed by all dfts; by Judge Charles Schwartz Jr. Date Signed: 4/6/95 (rg) [Entry date 04/10/95]
4/6/95	20	Reply Brief by defendant Walter L Brown Jr, defendant Perry S Brown to pla's response to dft's motion for summary judgment [9-1], and pla's motion to remand to Civil District court for the parish of Orleans [8-1] (rg)
4/6/95	22	Reply Memo by defendant Regions Bk of LA to pla's response to Regions motion for summary judgment [7-1] (rg) [Entry date 04/10/95]
4/6/95	24	Suppl Memorandum by defendant Fountainbleau in support of their motion for summary judgment [13-1] (rg) [Entry date 04/10/95]
4/20/95	26	ORDER AND REASONS: IT IS ORDERED that plas' mtn to remand is DENIED. FURTHER ORDERED that the mtns for sum jgm filed by dfts Regions

		Bank, Walter L. Brown, Jr., Perry S. Brown & FSA are GRANTED. Clerk to enter jgm. [13-1] [9-1] [8-1] [7-1] by Judge Charles Schwartz Jr. (rg) [Entry date 04/21/95]
4/26/95	27	JUDGMENT: IT IS ORDERED that there be jgm in favor of dfts Regions Bank of Louisiana, Walter L. Brown, Jr., Perry Brown, and Fountainbleau Storage Associates & agst plas Mary Rivet, Minna Winer, Edmond Miranne, & Edmond Miranne, Jr., dismissing plas claims w/prej, plas to bear all costs; by Clerk approved as to form by: Judge Charles Schwartz Jr. Date signed: 4/25/95 (CLOSED) (rg) [Entry date 04/27/95]
5/19/95	28	Notice of appeal by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr from Dist. Court decision, the order & reasons entered 4/21/95 and the jgm entered 4/27/95. (rg)
5/19/95	29	TRANSCRIPT Order Form by plaintiff Mary Anna Rivet, plaintiff Minna Ree Winer, plaintiff Edmond G Miranne, plaintiff Edmond G Miranne Jr. Transcript unnecessary for appeal purposes. (rg) [Entry date 05/23/95]
5/19/95	–	Payment of appeal fee by plaintiff Mary Anna Rivet in amount of $ 105.00 (rg) [Entry date 05/23/95]

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF:	NO. 84-02145-K
TULANE HOTEL INVESTORS LIMITED PARTNERSHIP	CHAPTER 7
DEBTOR	(Filed August 15, 1986)

ORDER

Considering the foregoing application by the Trustee for approval of employment of auctioneer, approval of sale by public auction, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approval of letter agreement by and between the Trustee and First Financial Bank, F.S.B., it is:

HEREBY ORDERED BY THIS HONORABLE COURT that creditors and parties in interest of this estate are given until the 12 day of June, 1986, to service any objection to the sale on the Trustee, and to file such objection with the Clerk of the U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if objections are received, a hearing will be held before the undersigned bankruptcy judge on the 16th day of June, 1986, at 9:00 o'clock A.m., in Room C-104, U. S. Bankruptcy Court, 500 Camp Street, New Orleans, Louisiana.

FURTHER ORDERED BY THIS HONORABLE COURT that if no objections are received this Honorable

Court hereby authorizes the employment of Marvin Kessler of Lemarco and Associates as auctioneer at a fee of $3,000.00, plus the reimbursement of expenses not to exceed $5,000.00; that this Honorable Court authorizes the sale by public auction as set forth in said application, on the 31 day of July, 1986, at 10:30 o'clock A.m., at 4040 Tulane Ave, free and clear of any and all interests, claims, liens, mortgages and encumbrances, and approves the letter agreement by and between the Trustee and First Financial Bank, F.S.B.

New Orleans, Louisiana, this 18th day of April, 1986.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
U. S. BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF LOUISIANA

IN RE:	CASE NO. 84-02145K
TULANE HOTEL INVESTORS LIMITED PARTNERSHIP	CHAPTER 11 CONVERTED TO CHAPTER 7
DEBTOR	(Filed Jun. 19, 1986)

****

ORDER AUTHORIZING EMPLOYMENT OF AUCTIONEER AND SALE BY PUBLIC AUCTION OF PROPERTY FREE AND CLEAR OF ANY AND ALL INTERESTS, CLAIMS, LIENS, MORTGAGES AND ENCUMBRANCES

On the 16th day of June, 1986, came on for hearing the Trustee's Application For Approval Of Employment Of Auctioneer And For Approval Of Sale By Public Auction, Free And Clear Of Any And All Interests, Claims, Liens, Mortgages And Encumbrances.

APPEARANCES:

Emile L. Turner, Jr. – attorney for Jean Hebert Turner, Trustee (hereinafter "the Trustee")

J. Michael Dendy – Attorney for Walter Brown

Edmond G. Miranne, Jr. – Attorney for Edmond. G. Miranne, Jr. and Edmond G. Miranne, Sr.

Lee C. Grevemberg – Attorney for Tulane Hotel Investors Corporation, Tulane Hotel Investors Limited Partnership, Barry Trinchard, and Norman Parent

Alwynn J. Cronvich – Attorney for McCann Electronics

It appearing that all creditors and parties in interest have been given the required notice, opportunity to object and be heard; further that this Court has determined that the sale is in the best interest of the estate and the public auction represents the best method of obtaining the best possible price under the circumstances of the property being sold, therefore:

IT IS HEREBY ORDERED that:

1) The Trustee is authorized to sell at public auction the property known as the Bayou Plaza Hotel, as more particularly described in Exhibits "A" and "B" attached hereto, less and except the property described in Exhibit "C" attached hereto;

2) The sale will be free and clear of any and all interests, claims, liens, mortgages and encumbrances including without limitation those items detailed on Exhibit "D" attached hereto (with exception made for those certain chattel mortgages as shown on Exhibit "C");

3) The Trustee is authorized to employ Marvin Kessler of Lemarco and Associates as auctioneer at the public auction sale, said auctioneer to receive $3,000.00 as compensation for services rendered plus the reimbursement of expenses not to exceed $5,000.00, which amounts shall be paid by the Bank after completion of the public auction sale;

4) The terms of the sale by public auction shall be (a) minimum opening bid of $5,250,000.00, which sum equals seventy-five (75%) percent of the appraised value of the property as found by the Court in its Judgment signed June 9, 1986; (b) the minimum opening bid shall be guaranteed by the Bank upon the terms and conditions as set forth in the letter agreement as shown in Exhibit "E" attached hereto, which terms and conditions are approved by the Court; (c) the Bank's minimum bid may be as a credit against the secured indebtedness in favor of the Bank; and (d) all bids other than that of the Bank shall be cash payable by ten (10%) percent non-refundable deposit at time of auction and balance payable not later than thirty (30) days from auction date.

5) In the event that the minimum bid by the Bank is exceeded, then the Trustee is authorized to distribute the sale proceeds first retaining the net amount of $150,000.00 for the estate; secondly, the balance of the proceeds shall be paid to the Bank in whole or partial payment of its secured claim;

6) Upon completion of the sale to the successful bidder, and receipt of the purchase price, Trustee is authorized and directed to execute and deliver a deed conveying unto the successful bidder the property as outlined in Paragraphs (1) and (2) *supra* and any and all other documents necessary to comply with the terms and conditions of the letter agreement attached as Exhibit "E";

7) Upon certification by the Trustee that the sale by public auction and conveyance to the successful bidder is complete, the Recorder of Mortgages for the Parish of Orleans, State of Louisiana, is hereby authorized and directed to cancel and

erase from the public records of his office all liens, mortgages and encumbrances, but only insofar as they may affect the property described in Exhibits "A" and "B" attached hereto, including without limitation, those liens, mortgages and encumbrances as shown on Exhibit "D" attached hereto except for those certain chattel mortgages as shown on Exhibit "C" attached hereto.

SO ORDERED, this 17th day of June, 1986, at New Orleans, Louisiana.

/s/ T.H. Kingsmill, Jr.
U. S. BANKRUPTCY JUDGE

EXHIBIT D

1) State of Louisiana, Dept. of Employment Security Tax Assessment & Liens Acct. #085164, Fountainbleau Hotel, a Louisiana corp., due $43,734.82, dated August 8, 1974, filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;

2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of $_____, recorded at MOB 2369, Folio 314 on May 4, 1981;

3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of $15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;

4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of $10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;

5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of $15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;

6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;

7) Contract Sum in the principal amount of $40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;

8) Contract Sum in the principal amount of $1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;

9) Contract Sum in the principal amount of $20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;

10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of $27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;

11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of $77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;

12) Lien in favor of Gerald Seale in the principal amount of $1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;

13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership,

in the principal amount of $16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;

14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of $2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;

15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;

16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of $12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;

17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of $3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;

18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of $44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;

19) Lien in favor of American District Telegraph Co., in the principal amount of $17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;

20) Lien in favor of American District Telegraph Co., in the principal amount of $6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;

21) Lien in favor of Pool & Patio Center in the principal amount of $7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;

22) Lien in favor of Paddison Construction Co., in the principal amount of $135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;

23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of $8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;

24) Lien in favor of Express Electric Co., Inc., in the principal amount of $26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;

25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of $9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;

26) Lien in favor of Help Service Co., Inc., in the principal amount of $18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;

27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of $2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;

28) Lien in favor of R. C. Flooring in the principal amount of $10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;

29) Collateral Mortgage in the principal amount of $5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;

30) Lien in favor of Boes Iron Works in the principal amount of $2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;

31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of $17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;

32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of $6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;

33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of $6,435.85 at MOB 2470, Folio 109 on September 13, 1984;

34) Lien in favor of Orleans Roofing & Materials in the principal amount of $12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;

35) Lien in favor of Montgomery Elevator Company in the principal amount of $135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;

36) Lien in favor of Edward Maurer International, Inc., in the principal amount of $55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;

37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of $1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;

33) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of $2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;

39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of $5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;

40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;

41) Lien in favor of Bassil's Ace Hardware in the principal amount of $2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;

42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of $26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;

43) Lien in favor of Foster Co., Inc., in the principal amount of $7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;

44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of $6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;

45) Lien in favor of Foster Co., Inc., in the principal amount of $17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;

46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of $10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;

47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of $2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;

48) Edmond G. Miranne, Sr., guarantor of the loan by First Financial Bank to Tulane Hotel Investors Limited Partnership, and claimant in the following proceedings:

a) "First Financial Bank versus Virginia Copeland, wife of/and Edward F. Butler". Case Number 303-674 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;

b) "First Financial Bank versus Wendy Early, wife of/and Norman A. Parent", Case Number 303-675 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;

c) "First Financial Bank versus Barry Trinchard", Case Number 303-676 of the Docket of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana;

d) "Tulane Hotel Investors Corporation, et al vs. First Financial Bank, F.S.B. et al", Case Number 84-6127 of the Docket of the United States District Court for the Eastern District of Louisiana;

e) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, F.S.B.", Case Number 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;

f) "First Financial Bank, F.S.B. vs. Tulane Hotel Investors Limited Partnership", Case No. 85-8279 of the Docket of the Civil District Court for the Parish of Orleans, State of Louisiana;

49) Mary Anna Rivet/wife of Edmond G. Miranne, Sr., and claimant in proceedings enumerated in Section 50, *supra*;

50) Edmond G. Miranne, Jr., limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;

51) Minna Ree Weiner/wife of Edmond G. Miranne, Jr., and claimant in proceedings enumerated in Section 50, *supra*;

52) Barry Trinchard, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;

53) Norman A. Parent, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;

54) Wendy Early/wife of Norman A. Parent, and claimant in proceedings enumerated in Section 50, *supra*;

55) Tulane Hotel Investors Corporation, corporate general partner of Tulane Hotel Investors Limited Partnership and claimant in proceedings enumerated in Section 50, *supra*;

56) Edward F. Butler, limited partner of Tulane Hotel Investors Limited Partnership, and claimant in proceedings enumerated in Section 50, *supra*;

57) Virginia Copeland/wife of and Edward F. Butler and claimant in proceedings enumerated in Section 50, *supra*;

58) Riverbank Mortgage Company, whatever interest may exist as a mortgage broker;

59) Sue Brignac, whatever interest she may have as a party in interest.

60) Notice of Lis Pendens by Edmond G. Miranne, Jr., in regard to the following proceedings:

a) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB, et al, bearing docket number 84-6127 of the United States District Court for the Eastern District of Louisiana;

b) "Tulane Hotel Investors Limited Partnership, et al vs. First Financial Bank, FSB", bearing docket number 85-7028 of the Civil District Court for the Parish of Orleans, State of Louisiana;

c) "First Financial Bank, FSB vs. Tulane Hotel Investors Limited Partnership", bearing docket number 85-8279 of the Civil District Court for the Parish of Orleans, State of Louisiana;

d) "First Financial Bank, FSB vs. Virginia Copeland, wife of, and Edward F. Butler", bearing docket number 303-674 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;

e) "First Financial Bank, FSB vs. Wendy Early, wife of, and Norman A. Parent", bearing docket number 303-675 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana;

f) "First Financial Bank, FSB vs. Barry Trinchard", bearing docket number 303-676 of the 24th Judicial District Court for the Parish of Jefferson, State of Louisiana.

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF:	*	
TULANE HOTEL INVESTORS LIMITED PARTNERSHIP	*	NO. 84-02145-K
	*	IN BANKRUPTCY
DEBTOR	*	

****

ORDER

Considering the foregoing Application of the Trustee herein, it is:

HEREBY ORDERED that the public auction sale held in the above captioned matter on Monday, August 11, 1986, at 2:00 p.m. in the Etouffe Dining Room, First Floor Bayou Plaza Hotel, 4040 Tulane Avenue, New Orleans, Louisiana, of the following:

A. All of the Debtor's Leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between Mrs. Lois Stern, wife of Walter Brown (and the said Walter Brown by intervention), as lessor and Pelican State Hotels Corporation, as lessee, dated October 4, 1957 and duly registered in COB 622, folio 126 on November 5, 1957, as amended May 22, 1958 and duly registered in COB 621, folio 595 on June 6, 1958; all of the right, title and interest of Pelican State Hotels Corporation was acquired by H. K. Weissberg Corporation by Agreement of Merger dated December 19, 1961 and duly registered in COB 644, folio 287, on

March 20, 1962; and all of the right, title and interest of Pennsylvania Real Estate Investment Trust was acquired by act under private signature, dated April 23, 1965, and duly registered in COB 668B, folio 254 on April 26, 1965. Fontainebleau-Orleans acquired said interest by act before Louis G. Dutel, Jr., N.P., dated December 30, 1975, COB 738A, folio 406.

B. All of the interest of the estate in and to the buildings and improvements located and/or situated on the following described property bearing municipal number 4000 Tulane Avenue, City of New Orleans, State of Louisiana, together with all the rights, ways, privileges, servitudes and appurtences thereunto belonging or in anywise appertaining, situated on the leasehold hereinabove described and consisting more particularly of the following described property:

THAT CERTAIN PORTION OF GROUND, together with all rights, ways, privileges, servitudes, appurtenances and advantages thereunto belonging or in anywise appertaining, situated in the First District of the City of New Orleans, designated as SQUARE NO. 763, bounded by Tulane and Carrollton Avenues and Gravier and South Pierce Streets, and according to a survey made by F. C. Gandolfo, Jr., Surveyor, dated July 7, 1937, a blue print copy of which is annexed to an Act before Robert Legier, Notary Public, on March 21, 1941, which survey was redated December 16, 1947, a blue print copy of which survey was annexed to an Act before Ernest Carrere, Jr., Notary Public, on December 22, 1947, said square measures 425 feet, 7 inches, 2 lines, actual, 424 feet, 2 inches, 6 lines, title, front on Carrollton Avenue, 425 feet, 9 inches,

no lines actual, 425 feet, 6 inches, 2 lines title, front on South Pierce Street, 604 feet, 3 inches, 5 lines actual, 602 feet, 11 inches, 2 lines title, front on Tulane Avenue, and 642 feet, 1 inch, 3 lines actual, 642 feet, 3 inches, no lines title, front on Gravier Street.

C. All of the estate's right, title and interest in and to that certain machinery, equipment, furniture, fixtures and/or all other property, of every nature and kind whatsoever, that has been placed in, upon or above the property hereinabove described for the service and operation of the buildings and improvements thereon or which is located thereon for the use of the Debtor, either directly or indirectly in such service or operation (less and except that property subject to the exception noted on Exhibit "B);

D. All of the estate's right, title and interest in and to those existing leases and/or subleases granted by Pelican State Hotels Corporation, H. R. Weissberg Corporation, "The Fontainebleau Motor Hotel", Pennsylvania Real Estate Investment Trust, Fontainebleau Hotel Corporation, and/or the Debtor as Lessor(s), to any present tenants, occupants, licensees, franchise and/or concession holders;

E. All of the Debtor's leasehold interest and estate, and all right, title, interest and privileges in and under that certain lease made and entered into by and between the City of New Orleans, Louisiana, as lessor, and Fontainebleau-Orleans, an Ordinary Partnership in Commendam, as lessee, said lease being authorized by ordinance Number 6134 dated September 30, 1976 and approved by the City Council on October 21, 1976, and the Mayor of the City

of New Orleans, Louisiana on October 22, 1976, and duly recorded in COB 743E, folio 118-124 of the conveyance records for the Parish of Orleans, on December 20, 1976.

Together with all buildings and improvements, appurtenances and attachments, rights, ways, privileges, servitudes, advantages, batture and batture rights, thereunto belonging or in anywise appertaining, including all immovables by nature or destination, and their component parts, now or hereafter forming part of and attached to or connected with said property or used in connection therewith.

F. All corporeal movables owned by the Debtor that are now and from time to time shall be located upon the above described premises for use in the conduct and/or operation of the hereinabove business and commercial activity, namely the hotel/motel now known as the Bayou Plaza Hotel including without limitation all equipment, furniture, television sets (less and except the television sets described in Section C hereof), fixtures of every kind and description, without exception that are now or may come upon the premises; and

G. All right, title and interest in and to that certain mass or assemblage of food and restaurant supplies, including canned and frozen foods, beer, wine and other alcohol beverages and soft drinks, constituting the entire stock of supplies and inventory of the Debtor now located and to be located at its place of business known as the Bayou Plaza Hotel located at 4040 Tulane Avenue, New Orleans, Louisiana 70119.

H. Less and except (a) certain television equipment; (b) certain private cable equipment leased

from McCann Electronics; (c) certain equipment leased from First Continental Leasing Corporation; (d) certain laundry equipment; (e) certain refrigeration equipment.

1. Equipment for private cable system owned and leased by Malcolm G. McCann, Jr., McCann Electronics, as described in the inventory.

2. Equipment owned and leased by First Continental Leasing Corporation as described in the three leases.

3. Television equipment and accessories subject to the vendor's lien of George H. Lehleitner & Co., Inc. as described in the inventory.

4. Laundry equipment subject to the chattel mortgage in favor of United Machinery Corporation recorded at MOB 2438, folio 365, on January 24, 1984.

5. Refrigeration equipment subject to the chattel mortgages in favor of Warren Refrigeration Company recorded at MOB 2438, folio 550, on January 13, 1984; MOB 2456, folio 43, on May 7, 1984; and MOB 2459, folio 12, on May 21, 1984, as described in the inventory.

to First Financial Bank, F.S.B., for the total price and sum of $5,250,000.00, all cash, free and clear of any and all liens and encumbrances except:

Chattel mortgage by Tulane Hotel Investors Limited Partnership in favor of United Machinery Corporation in the principal amount of $27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of $77,792.00, recorded at MOB 2438, Folio 550 on January 13, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of $16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;

Chattel Mortgage by Tulane Hotel Investors Limited Partnership in favor of Warren Refrigeration Company in the principal amount of $12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984.

be and the same is hereby approved.

IT IS FURTHER ORDERED, that the First Financial Bank, F.S.B., be and it is hereby ordered to pay to Marvin Kessler of Lemarco Associates, Inc., Auctioneer, fee of $3,000.00, plus the reimbursement of expenses not to exceed $5,000.00.

IT IS FURTHER ORDERED, that First Financial Bank, F.S.B., pay to the Trustee herein the sum of $150,000.00 as previously agreed.

IT IS FURTHER ORDERED, that the Recorder of Mortgages for the Parish of Orleans cancel and erase all liens, mortgages and encumbrances bearing against the said property, to-wit:

1) State of Louisiana, Dept. of Employment Security Tax Assessment & Lien, Acct. #085164, Fountainbleau Hotel, a Louisiana Corp., due $43,734.82, dated August 8, 1974,

filed September 10, 1974 (NA 139736), recorded at MOB 2255, Folio 28;

2) Supplemental Chattel Mortgage in favor of Central States Southeast & Southwest Areas Pension Fund by Fountainbleau-Orleans in the principal amount of $_____, recorded at MOB 2369, Folio 314 on May 4, 1981;

3) Tax Lien against Fountainbleau-Orleans in favor of the State of Louisiana in the principal amount of $15,678.28, recorded at MOB 2361, Folio 762 on December 22, 1981;

4) Collateral Chattel Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of $10,000,000.00, recorded at MOB 2425, Folio 500 on September 19, 1983;

5) Collateral Mortgage in favor of First Financial Bank by Tulane Hotel Investors Limited Partnership in the principal amount of $15,000,000.00, recorded at MOB 2426, Folio 674 on September 19, 1983;

6) Affidavit for No Work or Materials, recorded at MOB 2430, Folio 313 on September 19, 1983;

7) Contract Sum in the principal amount of $40,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 425 on October 4, 1983;

8) Contract Sum in the principal amount of $1,453,261.00, Agreement September 2, 1983, recorded at MOB 2430, Folio 428 on October 4, 1983;

9) Contract Sum in the principal amount of $20,000.00, Agreement August 29, 1983, recorded at MOB 2430, Folio 438 on October 4, 1983;

10) Chattel Mortgage in favor of United Machinery Corporation by Tulane Hotel Investors Limited Partnership, in the principal amount of $27,012.00, recorded at MOB 2438, Folio 365 on January 24, 1984;

11) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of $77,792.00, recorded at MOB 2438, Folio 550 on February 13, 1984;

12) Lien in favor of Gerald Seale in the principal amount of $1,365.00, recorded at MOB 2433, Folio 778 on April 13, 1984;

13) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of $16,280.78, recorded at MOB 2456, Folio 43 on May 7, 1984;

14) Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of $2,141.08, recorded at MOB 2470, Folio 301 on May 10, 1984;

15) Acceptance of Unrecorded Contract May 7, 1984, recorded at MOB 2452, Folio 309 on May 18, 1984;

16) Chattel Mortgage in favor of Warren Refrigeration Co. by Tulane Hotel Investors Limited Partnership, in the principal amount of $12,513.60, recorded at MOB 2459, Folio 12 on May 21, 1984;

17) Lien in favor of T.N.T. Drywall Supplies, Inc., in the principal amount of $3,801.91, recorded at MOB 2455, Folio 120 on June 1, 1984;

18) Lien in favor of Pelican Plumbing Supply, Inc., in the principal amount of $44,153.87, recorded at MOB 2455, Folio 168 on June 13, 1984;

19) Lien in favor of American District Telegraph Co., in the principal amount of $17,072.81, recorded at MOB 2455, Folio 179 on June 15, 1984;

20) Lien in favor of American District Telegraph Co., in the principal amount of $6,441.33, recorded at MOB 2463, Folio 173 on July 11, 1984;

21) Lien in favor of Pool & Patio Center in the principal amount of $7,275.29, recorded at MOB 2463, Folio 261 on July 16, 1984;

22) Lien in favor of Paddison Construction Co., in the principal amount of $135,000.00, recorded at MOB 2463, Folio 270 on July 17, 1984;

23) Lien in favor of Commercial Painting Co., Inc., in the principal amount of $8,655.38, recorded at MOB 2463, Folio 480 on July 30, 1984;

24) Lien in favor of Express Electric Co., Inc., in the principal amount of $26,936.91, recorded at MOB 2463, Folio 498 on August 3, 1984;

25) Lien in favor of W. F. Keller Co., Inc., in the principal amount of $9,793.00, recorded at MOB 2463, Folio 532 on August 8, 1984;

26) Lien in favor of Help Service Co., Inc., in the principal amount of $18,396.47, recorded at MOB 2463, Folio 548 on August 10, 1984;

27) Lien in favor of Reliable Disposal Co., Inc., in the principal amount of $2,160.00, recorded at MOB 2463, Folio 564 on August 15, 1984;

28) Lien in favor of R. C. Flooring in the principal amount of $10,479.16, recorded at MOB 2463, Folio 574 on August 16, 1984;

29) Collateral Mortgage in the principal amount of $5,000,000.00, before J. F. Quaid, Notary Public, recorded at MOB 2469, Folio 3 on August 17, 1984;

30) Lien in favor of Boes Iron Works in the principal amount of $2,475.00, recorded at MOB 2470, Folio 44, on September 5, 1984;

31) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of $17,072.81, recorded at MOB 2464, Folio 507 on September 7, 1984;

32) Affidavit of Lis Pendens in favor of American District Telegraph Co., in the principal amount of $6,441.33, recorded at MOB 2464, Folio 507 on September 7, 1984;

33) Lien in favor of Wholesale Electric Supply Co., in the principal amount of $6,435.85, at MOB 2470, Folio 109 on September 13, 1984;

34) Lien in favor of Orleans Roofing & Materials in the principal amount of $12,024.38, recorded at MOB 2470, Folio 148 on September 18, 1984;

35) Lien in favor of Montgomery Elevator Company in the principal amount of $135,621.40, recorded at MOB 2470, Folio 155 on September 19, 1984;

36) Lien in favor of Edward Maurer International, Inc., in the principal amount of $55,600.00, recorded at MOB 2470, Folio 192 on September 21, 1984;

37) Lien in favor of Delta C.T. Patterson Co., Inc., in the principal amount of $1,942.07, recorded at MOB 2470, Folio 204 on September 21, 1984;

33) [sic] Lien in favor of Southland Plumbing Supply, Inc., in the principal amount of $2,141.08, recorded at MOB 2470, Folio 301 on October 5, 1984;

39) Lien in favor of Krogh Electric Supply, Inc., in the principal amount of $5,792.61, recorded at MOB 2470, Folio 339 on October 11, 1984;

40) Notice of Pendency of Action in favor of Pelican Plumbing Supply, CDC 84-16988, recorded at MOB 2473, Folio 99 on October 12, 1984;

41) Lien in favor of Bassil's Ace Hardware in the principal amount of $2,928.46, recorded at MOB 2470, Folio 441 on November 2, 1984;

42) Lien in favor of Nofie D. Alfonso, Jr. & Associates in the principal amount of $26,361.00, recorded at MOB 2470, Folio 447 on November 2, 1984;

43) Lien in favor of Foster Co., Inc., in the principal amount of $7,317.36, recorded at MOB 2479, Folio 96 on November 16, 1984;

44) Lien in favor of Bernard Lumber Co., Inc., in the principal amount of $6,177.89, recorded at MOB 2479, Folio 216 on December 14, 1984;

45) Lien in favor of Foster Co., Inc., in the principal amount of $17,317.36, recorded at MOB 2479, Folio 325 on January 8, 1985;

46) Seizure and Sale in favor of First Financial Bank (FSB) in the principal amount of $10,622,001.63, CDC 85-8279, May 16, 1985, recorded at MOB 2493, Folio 457 on May 16, 1985;

47) Federal Tax Lien against Tulane Hotel Investors Corporation in the principal amount of $2,198.39, recorded at FTL 28, Folio 174 on February 24, 1986;

48) Notice of Lis Pendens by Edmond G. Miranna, Jr., filed in MOB 2525, folio 360.

IT IS FURTHER ORDERED, that Jean Hebert Turner, Trustee herein, be and she is hereby authorized to execute any and all documents necessary to effectuate the transfer of the hereinabove described property to First Financial Bank, F.S.B., the successful bidder.

New Orleans, Louisiana, this 14th day of August, 1986.

/s/ T. H. Kingsmill, Jr.
T. H. KINGSMILL, JR.
UNITED STATES
BANKRUPTCY JUDGE

Official Mortgage Certificate,
Prepared by the Recorder of Mortgages
of Orleans Parish, State of Louisiana

MICHAEL P. McCROSSEN

STATE OF LOUISIANA – PARISH OF ORLEANS

RECORDER OF MORTGAGES

I, MICHAEL P. McCROSSEN, RECORDER OF MORTGAGES FOR THE PARISH OF ORLEANS, CERTIFY THAT THIS CERTIFICATE HAS BEEN RUN EXCLUSIVELY IN THE EXACT NAMES HEREUNDER SET FORTH AND NOT IN ANY VARIATIONS OF SAID NAMES.

WHERE NO MIDDLE INITIALS HAVE BEEN FURNISHED, IDENTICAL NAMES WITH MIDDLE INITIALS HAVE NOT BEEN RUN AND WILL NOT BE UNLESS SPECIFICALLY REQUESTED.

SUBJECT TO THESE RESTRICTIONS AND EXCEPTIONS, I CERTIFY THAT ACCORDING TO THE RECORDS OF MY OFFICE THERE ARE NO UNCANCELLED ENCUMBRANCES RECORDED IN THE EXACT NAMES HEREINAFTER SET FORTH EXCEPT THE FOLLOWING WHICH BEAR AGAINST THE PROPERTY DESCRIBED HEREUNDER, TO-WIT:

Computer Generated Certificate for Inscriptions
Recorded after September 20, 1987

03/16/95 COMPUTER PAGE: 1
CLERK:JAJ

ORLEANS PARISH RECORDER
OF MORTGAGES OFFICE
MICHAEL P. MCCROSSEN,
RECORDER OF MORTGAGES
CERTIFICATE GENERATION
REG. NUMBER: 20284 CERT. DATE: 03-15-1995

THIS CERTIFICATE IS GENERATED FOR THE FOLLOWING NAMES INPUT:
FONTAINEBLEAU,
TULANE HOTEL,
FIRST FINANCIAL,
LAST OF NAMES,

88255 FEDERAL TAX LIEN
FONTAINEBLEAU ORLEANS INC,
2/ 5/1990 SER# 729001699 1/25/90 LPS
REV - USA $ 3,894.00

112713 MISCELLANEOUS
FIRST FINANCIAL BANK,
F.S.B., ET AL,
10/24/1990 NOTICE TERMINATION OF
ACTION...RECORD IN FULL
REV - TULANE HOTEL
INVESTORS C $ .00
N.P. - K. O'BRYON - 2798 - 4

260602 MORTGAGE
TULANE HOTEL INVESTORS
LIMITED PART, NERSHIP [sic]
4/11/1994 REINSCRIPTION
REV - ANY PERSON, FIRM
OR CORPORATION $ 5,000,000.00
N.P. - J. F. QUAID - 05 02 1984

TOTAL INSCRIPTION THIS SESSION: 3

Renewed and made good

This certificate consists of 2 page(s) #2 of 2 page(s). 9 A.M. New Orleans, LA 3-10 1995

/s/ John U. Jagot
Deputy Recorder

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARY ANNA RIVET, MINNA REE WINER, EDMOND G. MIRANNE, AND EDMOND G. MIRANNE, JR. — CIVIL ACTION

VERSUS — NO. 95-0426

REGIONS BANK, WALTER L. BROWN, JR., PERRY S. BROWN, AND FOUNTAINBLEAU STORAGE ASSOCIATES — SECTION "A"

ORDER AND REASONS

This matter is before the Court on a Motion to Remand filed by plaintiffs Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., and Motions for Summary Judgment filed by defendants Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates ("FSA"). Both motions were set for hearing on April 5, 1995, but were submitted on the briefs. For the reasons stated herein, plaintiffs, Motion to Remand is hereby DENIED and defendants' Motion for Summary Judgment is hereby GRANTED.

I. BACKGROUND

This suit concerns the vitality of a $5,000,000 collateral mortgage note secured by a collateral mortgage on certain real property located on Tulane Avenue in New Orleans, Louisiana. In 1957, Lois Stern executed a lease on the property in favor of Pelican State Hotel Corporation. The leasehold estate created by the lease was

acquired by Tulane Hotel Investors Limited Partnership ("THILP") on September 15, 1983. On the same date, THILP granted a first mortgage on the leasehold estate to secure a $15,000,000 collateral mortgage note pledged to First Financial Bank. On May 2, 1984, THILP granted a $5,000,000 second collateral mortgage (the "Second Mortgage") on the leasehold estate.[1] This Second Mortgage forms the basis of the present dispute.

THILP filed for Chapter 11 bankruptcy on October 5, 1984. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee appointed.[2] The trustee applied for court approval to sell the leasehold estate at public auction free and clear of all liens including, specifically, the Second Mortgage. The bankruptcy court issued an order advising all creditors and parties in interest of the sale and setting a hearing on any objections for June 16, 1986. At the hearing, plaintiff Edmond G. Miranne, Jr. appeared on behalf of himself and his father, Edmond G. Miranne, Sr., as holders of the Second Mortgage. Their wives, plaintiffs Minna Lee [sic] Winer and Mary Anna Rivet, did not appear. On June 17, 1986, the bankruptcy court granted the sale application and ordered that the

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[1] For purposes of brevity, the Court will continue to refer to the "leasehold estate" as the prime subject of this dispute as it is uncontested that the plaintiffs' collateral mortgage burdened the leasehold estate. The Court's disposition of these motions moots defendants' alternate argument that plaintiffs' mortgage was extinguished by confusion, thereby removing any need to address plaintiffs' contention that the mortgage also attached to the buildings on the property as separate immovables.

[2] *See Matter of Tulane Hotel Investors Limited Partnership*, No. 84-02145-K, (Bankr.E.D.La. December 5, 1985).

sale be free and clear of all liens and encumbrances, including the Second Mortgage.

Pursuant to the bankruptcy court's June 17, 1986 order, the leasehold estate was sold at public auction to the first mortgage holder, First Financial Bank. On August 14, 1986, the bankruptcy court approved the auction results and issued an order directing sale of the property to First Financial Bank "free and clear of any and all liens and encumbrances" and specifically requiring cancellation of the Second Mortgage. Notwithstanding the terms of the bankruptcy court's order, the Second Mortgage was apparently never canceled and remains inscribed on the public records.

Secor Bank eventually succeeded First Financial Bank as owner of the leasehold estate. On December 29, 1993, defendants Walter S. Brown and Perry L. Brown sold the subject property to Secor, making Secor owner of both the property and the leasehold estate. On the same date Secor in turn conveyed its interest to FSA, the current owner.

Plaintiffs filed suit in state court alleging that the December 29, 1993 transactions violated their superior rights under the Second Mortgage. They sought payment of their secured debt and to have the Second Mortgage recognized and maintained against the property, or alternatively, damages. Defendants removed the suit to this Court, citing federal question jurisdiction in that the prior bankruptcy court orders extinguished the Second Mortgage. Plaintiffs filed a motion to remand, arguing that the prior bankruptcy court orders provide defendants with at most an affirmative defense insufficient to confer removal

jurisdiction. Defendants subsequently moved for summary judgment on grounds of *res judicata*, prescription, and confusion.

II. MOTION TO REMAND

The Fifth Circuit recently reiterated the principles governing federal question removal in *Carpenter v. Wichita Falls Independent School District*, 44 F.3d 362 (5th Cir. 1995). Generally, whether a cause of action presents a federal question for removal purposes depends upon the allegations of the plaintiff's well-pleaded complaint. *Id.* at 366. Accordingly, federal rights asserted by way of affirmative defense do not confer removal jurisdiction. However, the "artful pleading" doctrine, an exception to the "well-pleaded complaint" rule, provides that "where the plaintiff necessarily has available no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law." *Id.* In other words, plaintiff cannot avoid removal of a suit necessarily federal in character. *Id.* at 367.

In *Carpenter*, the Fifth Circuit specifically addressed the artful pleading doctrine in the context of *res judicata*, holding that a defendant may properly remove a purported state law cause of action which is "completely precluded by a prior federal judgment on a question of federal law." The Court's explanation is controlling here:

> [ ]Although we recognize that the state courts are able and required to apply federal rules of res judicata, *the federal law preclusive effect of the federal judgment could arguably be said*

> *to confer a federal character much the way complete preemption does. In both cases, federal law has in some sense extinguished the possibility of a state-court cause of action.*
>
> We also point out that the existence of a prior federal judgment lifts the statutory bar against enjoining an ongoing state proceeding. There is little practical distinction between, on the one hand, removing and dismissing a precluded state suit and, on the other hand, enjoining one. Under the relitigation exception to the Anti-Injunction Act, federal courts may enjoin state-court proceedings to protect prior federal judgments.

Id. at 370 (citations omitted and emphasis supplied). Thus under *Carpenter,* the propriety of removal in the present case hinges on whether the federal bankruptcy court's June 17, 1986 and August 14, 1986 orders preclude the plaintiffs' current attempt to enforce their mortgage.

Under the Fifth Circuit's formulation, *res judicata* bars a subsequent claim if: (1) the prior disposition was a final judgment on the merits rendered by a court of competent jurisdiction; (2) the parties are identical; and (3) the causes of action are the same. *Eubanks v. F.D.I.C.*, 977 F.2d 166, 169 (5th Cir. 1992); *Hendrick v. Avent*, 891 F.2d 583, 585 (5th Cir.), *cert. denied*, 498 U.S. 819 (1990). The present case satisfies all three elements of *res judicata*. It is undisputed that the bankruptcy court's August 14, 1986 Order approving the sale of the leasehold estate to First Financial constituted a final judgment rendered by a competent

court.[3] As to the identity of parties element, the Court notes that First Financial Bank was a party to the bankruptcy proceedings. As successors-in-interest to First Financial Bank, Regions Bank and FSA are bound by the bankruptcy court's orders in the same manner as their predecessor. *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990). Although plaintiffs Rivet and Winer did not personally appear in the bankruptcy proceedings, the Fifth Circuit has held that a husband's participation in a bankruptcy proceeding binds a wife whose interests are closely aligned with and adequately represented by her husband. *Eubanks v. F.D.I.C.*, 977 F.2d 166 (5th Cir. 1992). Plaintiffs do not even attempt to argue, and indeed it seems wholly implausible, that the Mirannes represented only their own interests at the bankruptcy hearing and not also their wives' interests in preserving and enforcing the Second Mortgage.

Finally, the identity of claims element is satisfied because plaintiffs' claims both in this action and in the bankruptcy proceeding turn on the validity of the Second Mortgage which was determined by the bankruptcy court. Plaintiffs' argument that their cause of action arises solely from the December 29, 1993 transactions ignores

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[3] Plaintiffs' opposition memorandum asserts at some length various procedural misteps committed by the bankruptcy court in disposing of the leasehold estate, however these arguments are irrelevant as the exclusive mechanism for attacking an improvidently granted bankruptcy order is a timely appeal or request for reconsideration. *Matter of Aguilar*, 861 F.2d 873, 874 (5th Cir. 1988) (citing *Matter of Colley*, 814 F.2d 1008, 1010 (5th Cir.), *cert. denied*, 484 U.S. 898 (1987).

the fact that all of plaintiffs' claims depend on the existence of a valid and enforceable mortgage. Absent an enforceable mortgage, the December 29, 1993 transactions would not contravene any of plaintiffs' rights and would not be actionable.

Because all three elements of *res judicata* are met, the prior federal bankruptcy court order completely precludes plaintiffs' present cause of action, making removal to federal court proper under *Carpenter*. Plaintiffs argue that any theory of removal jurisdiction based on claim preclusion is necessarily limited by the Supreme Court's decision in *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 108 S.Ct. 1684 (1988) to those situations where the specific claims sought to be precluded were "actually litigated" in the prior proceeding. Even assuming that plaintiffs are correct as to the significance of *Chick Kam Choo* in this context, the Court finds that the "actually litigated" requirement was satisfied here. As previously discussed, the central issue underlying plaintiffs' cause of action is the validity of their Second Mortgage as determined by the bankruptcy court. Plaintiffs' charge that defendants fail to put forward any issue that was "actually litigated" in the prior bankruptcy proceeding ignores the whole focus of defendants' various memoranda, namely, that the validity of plaintiffs' Second Mortgage was necessarily decided once and for all as a precursor to authorizing the sale of the leasehold estate free and clear of all liens.[4]

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[4] The Court moreover refuses plaintiffs' invitation to elevate semantics over substance by demanding that defendants employ the totemic words "issue preclusion" rather than the traditional and still widely extant term "*res judicata*." *See e.g., U.S. v. Shanbaum*, 10 F.3d 305, 310-14 (5th Cir. 1994).

Finally, plaintiffs' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*, 864 F.2d 36 (5th Cir. 1989) is misplaced. In *D-1 Enterprises*, the Fifth Circuit refused to apply *res judicata* against counterclaims which were largely unrelated to and which could not have been raised in an earlier summary bankruptcy proceeding. Here on the other hand, plaintiffs' objections to the sale free and clear of their Second Mortgage could have and should have been raised before the bankruptcy court in connection with the trustee's motion to sell. Once the bankruptcy court's orders became final and the property was ordered sold free and clear of plaintiffs' Second Mortgage, all claims relating to the validity of the Second Mortgage were *res judicata*. Removal is thus authorized because the bankruptcy court's orders "extinguished the possibility of a state-court cause of action" to enforce plaintiffs' Second Mortgage. *See Carpenter*, 44 F.3d at 370.

III. MOTIONS FOR SUMMARY JUDGMENT

The Court's holding that the prior federal bankruptcy orders completely preclude plaintiffs' suit to enforce their Second Mortgage necessitates dismissal of plaintiffs' claims against Regions Bank and FSA. The Court's holding also moots plaintiffs' request for further discovery pursuant to Federal Rule of Civil Procedure 56(f), as none of the facts anticipated to be discovered by plaintiffs would mandate an alternate result on the dispositive

issue of preclusion. *See* Affidavit of John Gregory Odom Pursuant to Rule 56(f).

The final matter before the Court is the Motion for Summary Judgement filed by defendants Walter L. Brown, Jr. and Perry S. Brown. The basis of plaintiffs' claim is that the Browns "knowing[ly] participa[ted] in the series of transactions by which the Leasehold estate was cancelled [sic] and the separately owned buildings transferred in spite of the mortgage." *See* Memorandum in Opposition to Separate Motions for Summary Judgment at 14-15. However plaintiffs admit at page [sic][5] of their opposition memorandum that the Browns did *not* participate in the prior bankruptcy proceedings, and it is therefore difficult to see how the Browns can in any way be held responsible for plaintiffs' loss of rights pursuant to those proceedings. Moreover, plaintiffs themselves characterize their action as one *in rem*, which by definition is a claim against property, not against its former owners. The only case cited by plaintiffs in connection with their claim against the Browns, *In re Big Apple Scenic Studio, Inc.*, 63 B.R. 85 (Bkrtcy. S.D.N.Y. 1986), exhibits no relevance to the present case as it involved a Chapter 7 trustee's action to recover post-petition transfers. Finally, plaintiffs' nebulous allegation that "the Browns are proper parties herein because they are liable to plaintiffs under La. Civ. Code. art. 2315" fails to discharge plaintiffs' burden in opposing summary judgment. Plaintiffs have simply failed to establish any legal basis or any

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[5] *See* Memorandum in Opposition to Separate Motions for Summary Judgment at 9.

triable issue of fact to support a claim against the Browns. Accordingly,

IT IS ORDERED that plaintiffs' motion to remand is hereby DENIED;

IT IS FURTHER ORDERED that the motions for summary judgment filed by defendants Regions Bank, Walter L. Brown, Jr., Perry S. Brown, and FSA are hereby GRANTED.

The Clerk of Court is hereby directed to enter judgment dismissing this suit in accordance herewith.

New Orleans, Louisiana, this 20th day of April, 1995.

/s/ Charles Schwartz, Jr.
UNITED STATES
DISTRICT JUDGE

Mary Anna RIVET, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr., Plaintiffs-Appellants,

v.

REGIONS BANK OF LOUISIANA, F.S.B., Walter L. Brown, Jr., Perry S. Brown, and Fountainbleau Storage Associates, Defendants-Appellees.

No. 95-30524.

United States Court of Appeals,

Fifth Circuit.

March 13, 1997.

Holders of second mortgage on Chapter 7 debtor's leasehold estate brought state court action against successors-in-interest of bank that had purchased leasehold at auction and original lessors' successors-in-interest, to enforce their interest in property. Defendants removed case to federal district court, asserting federal question jurisdiction on theory that prior bankruptcy court orders expressly extinguished holders' rights under second mortgage, and moved for summary judgment. Holders sought remand. The United States District Court for the Eastern District of Louisiana, Charles Schwartz, Jr., J., 1995 WL 237019, denied motion to remand, and granted summary judgment for defendants. Holders appealed. The Court of Appeals, Wiener, Circuit Judge, held that: (1) case was properly removed pursuant to res judicata artful pleading exception to well pleaded complaint doctrine; (2) prior bankruptcy court orders authorizing and approving sale of leasehold estate free and clear

of encumbrances barred state action as to bank's successors-in-interest; (3) federal district court had supplemental jurisdiction over original lessors' successors-in-interest, who could not assert res judicata; and (4) original lessors' successors-in-interest were not personally liable to holders for loss of second mortgage.

Affirmed.

Edith H. Jones, Circuit Judge, dissented and filed opinion.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before JONES and WIENER, Circuit Judges, and FURGESON,* District Judge.

WIENER, Circuit Judge:

Plaintiffs-Appellants Mary Anna Rivet, Minna Ree Winer, Edmond G. Miranne, and Edmond G. Miranne, Jr. (collectively, the Mirannes)[1] appeal the district court's order refusing to remand their case to the Louisiana state court from which it had been removed by Defendants-Appellees Regions Bank, Walter L. Brown, Perry S. Brown, and Fountainbleau Storage Associates (FSA) (collectively, the defendants). The Mirannes also appeal the district court's grant of the defendants' motions for summary judgment dismissing that action. Concluding that

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* District Judge of the Western District of Texas, sitting by designation.

[1] Edmond G. Miranne and Mary Anna Rivet are husband and wife, and Edmond G. Miranne, Jr. and Minna Ree Winer are husband and wife.

the district court correctly denied remand under the "artful pleading" exception to the well-pleaded complaint doctrine, we affirm the refusal to remand the Mirannes' suit to state court; and, agreeing that summary judgment of dismissal was providently granted on the basis of claim preclusion, we affirm.

I.

FACTS AND PROCEEDINGS

This action concerns the viability of a $5,000,000 second mortgage on the interest of the lessee (leasehold estate)[2] in a parcel of immovable property (leased premises) located at the intersection of Tulane and Carrolton Avenues in New Orleans, Louisiana.[3] In 1957, Lois Stern as lessor granted a ground lease of the leased premises to Pelican State Hotel Corporation as lessee. As a result of

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[2] "Leasehold estate" is a term unknown to the Civil Law, which does not recognize estates in land. *See* A.N. Yiannopoulos, 2 *Louisiana Civil Law Treatise* § 226 at 422-23 (3d ed.1991). In Louisiana, a lease of immovable (real) property is a personal (in personam) contract which does not create rights in rem; however, under provisions of various statutes, both predial (real estate) and mineral leases are afforded some of the attributes of rights *in rem*, notably the protection of the public records doctrine, including the susceptibility of the rights of the lessee to conventional (real estate) mortgages and the ranking of such encumbrances among themselves based on time of recordation. *See id.*, at 424-25, *and also* La.Rev.Stat. Ann. §§ 2721 & 2754-56 (West 1991).

[3] The location of the leased premises is a legendary one to many New Orleanians. For years the property was the site of Pelican Stadium, the home field of the old New Orleans Pelicans minor league baseball team.

several subsequent assignments, the leasehold estate was eventually acquired by Tulane Hotel Investors Limited Partnership (THILP) on September 15, 1983. On the same date, THILP granted a collateral mortgage (first mortgage) encumbering the leasehold estate to secure a $15,000,000 collateral mortgage note, which in turn was pledged as collateral on a loan from First Financial Bank (FFB).[4] In May of the following year, THILP granted another collateral mortgage (second mortgage) on the leasehold estate, this one to secure a $5,000,000 collateral mortgage note pledged to and held by the Mirannes.[5]

In 1985, little more than a year after granting the second mortgage, THILP filed for protection under Chapter 11 of the Bankruptcy Code. The bankruptcy was later converted to a Chapter 7 proceeding and a trustee was appointed. In the spring of 1986, the trustee applied for court approval to sell the leasehold estate at public auction, free and clear of essentially all encumbrances, specifically including the second mortgage.[6] The bankruptcy court issued an order advising all creditors and parties in interest who might oppose the proposed sale to serve any

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[4] See Max Nathan, Jr., *The Collateral Mortgage, Logic and Experience*, 49 La. L.Rev. 39 (1988), for a discussion of the collateral mortgage, that unique Louisiana "hybrid security device, combining the elements of both pledge and mortgage." *Id.* at 39-40.

[5] One of the holders of the note, Edmond G. Miranne, Jr., also appears to have been a partner of THILP.

[6] At this point, the leasehold estate consisted principally of the Bayou Plaza Hotel, formerly known as the Fountainbleau Hotel.

objections to the sale on the trustee and file such objections with the court by June 12, 1986. The court also set June 16, 1986 as the date for a hearing on the trustee's application. At the hearing, plaintiff Edmond G. Miranne, Jr., an attorney-at-law, appeared on behalf of himself, pro se, and his father, plaintiff Edmond G. Miranne, as holders of the note secured by the second mortgage. Their respective wives, plaintiffs Minna Ree Winer and Mary Anna Rivet, did not appear in person; neither were they identified by name as being represented by Miranne, Jr.

On the day after the hearing, the bankruptcy court granted the sale application and ordered that the leasehold estate be sold free and clear of virtually all liens and encumbrances, expressly identifying the second mortgage held by the Mirannes as one of the myriad encumbrances to be canceled. As no appeal was taken from that order, the trustee proceeded with the public auction of the leasehold estate. At the auction, FFB, the holder of the first mortgage, submitted the only bid. Approximately two months later, the bankruptcy court approved the auction results, directed that the sale of the leasehold estate to FFB be consummated, and ordered the Recorder of Mortgages for Orleans Parish to cancel the liens and encumbrances listed, which expressly included the second mortgage held by the Mirannes. Despite the bankruptcy court's order, however, the second mortgage was, for some as yet unexplained reason, never canceled and remained inscribed on the public records of Orleans Parish.

Secor Bank eventually succeeded FFB as owner of the leasehold estate. In December 1993, Defendants-

Appellees Walter L. Brown and Perry S. Brown, successors-in-interest to the original lessors, sold the leased premises to Secor, thereby vesting Secor with perfect ownership of the leased premises.[7] Later the same day, Secor in turn conveyed its newly acquired full ownership in the leased premises to FSA, which remained the record owner as of the commencement of the instant litigation. Secor was thereafter succeeded by Regions.

A year later, the Mirannes filed this suit in Louisiana state court against the defendants, alleging that the December 1993 transactions – in which the Browns conveyed their interest in the leased premises to Secor (which already owned the leasehold estate), and Secor in turn conveyed the leased premises in full ownership to FSA – had the net effect of canceling the lease and thereby abrogating the Mirannes' purported rights under the second mortgage which, they alleged, still encumbered the leasehold estate. The Mirannes sought (1) to have the second mortgage recognized and enforced, via ordinaria, against the immovable property located on the leased premises, or (2) alternatively, damages. In their complaint, the Mirannes assiduously avoided any hint of

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[7] Under Louisiana Civil Code Article 1903, an obligation may be extinguished by "confusion" when the qualities of obligee and obligor are united in the same person. Thus when a lessor's interest and a lessee's interest in the same immovable property are consolidated in the same person, the lease ceases to exist and the person vested with both interests will hold perfect or full ownership – essentially the equivalent of "fee simple" title in the common law. *See Ranson v. Voiron*, 176 La. 718, 146 So. 681, 682 (1931).

the previous bankruptcy proceedings and orders affecting the leased premises, the leasehold estate, and their second mortgage against it.

The defendants removed the case to federal district court, asserting federal question jurisdiction on the theory that the 1986 bankruptcy court orders expressly extinguished the Mirannes' rights under the second mortgage. Following removal, Regions and FSA filed motions for summary judgment asserting, inter alia, claim preclusion based on the bankruptcy court's orders. The Browns also filed for summary judgment adopting Regions and FSA's claim preclusion defense and asserting, as a separate and independent basis for dismissal, the Mirannes' failure to state a cause of action against the Browns. More or less simultaneously, the Mirannes sought remand, contending that the bankruptcy court orders at most provided defendants with an affirmative defense and thus could not confer removal jurisdiction. The district court denied the Mirannes' motion to remand, relying primarily on the principles announced by this court in *Carpenter v. Wichita Falls Independent School District*.[8] At the same time, the court granted summary judgment in favor of FSA and Regions on claim preclusion grounds, and in favor of the Browns on their separate and independent grounds. The Mirannes timely filed a notice of appeal from these rulings.

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[8] 44 F.3d 362 (5th Cir.1995).

II.

ANALYSIS

A. Removal Jurisdiction – Basic Principles

We have recently reviewed the well established principles governing federal question removal jurisdiction.[9] The denial of a motion to remand an action removed from state to federal court presents a question of federal subject matter jurisdiction and statutory construction which we review *de novo* on appeal.[10] As a defendant's use of the removal statute[11] deprives a state court of a case properly before it and thereby implicates concerns of federalism, that statute must be strictly construed.[12] It follows that the defendant who seeks to sustain removal must also bear the burden of establishing federal jurisdiction over the subject matter of the state court suit.[13]

As a general proposition, removal hinges on whether a federal district court could have asserted original jurisdiction over the state court action had it initially been filed in federal court.[14] When a defendant seeks to remove a state court suit on the basis of federal question

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[9] *See id.* at 365-67.

[10] *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 593 (5th Cir.1991).

[11] 28 U.S.C. § 1441.

[12] *Carpenter*, 44 F.3d at 365-66.

[13] *Id.* at 365.

[14] *See* 28 U.S.C. § 1441(a).

jurisdiction, as was the case here, removal will be appropriate only if the action is one "arising under the Constitution, laws or treaties of the United States."[15] In most cases, a defendant's assertion of federal question removal jurisdiction will rise or fall on the allegations in the plaintiff's "well-pleaded complaint,"[16] that is, on whether "there appears on *the face of the complaint* some substantial, disputed question of federal law."[17] This means that the defendant must predicate his assertion of federal jurisdiction on the allegations of the plaintiff's claim, not, for example, on the basis of an anticipated or even an inevitable federal defense.[18] As Justice Cardozo succinctly put it, the defendant must show that a federal right is "an element, and an essential one, of the plaintiff's cause of action."[19]

B. Artful Pleading Exception – Federal Res Judicata

Federal courts have over the years created but a few narrow exceptions to the fundamental precept of the well-pleaded complaint doctrine that "[t]he plaintiff is master of her complaint."[20] The common rationale for

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[15] 28 U.S.C. §§ 1331 & 1441(b).

[16] *Carpenter*, 44 F.3d at 366 (citing *Louisville & Nashville R. Co. v. Motley*, 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908)).

[17] *Carpenter*, 44 F.3d at 366 (citing *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 12, 103 S.Ct. 2841, 2848, 77 L.Ed.2d 420 (1983)) (emphasis added).

[18] *Carpenter*, 44 F.3d at 366.

[19] *Gully v. First Nat'l Bank*, 299 U.S. 109, 112, 57 S.Ct. 96, 97, 81 L.Ed. 70 (1936).

[20] *Carpenter*, 44 F.3d at 366.

these jurisprudential exceptions – euphemistically known by the cynically sarcastic sobriquet of the "artful pleading exception" – is that when a plaintiff has available "no legitimate or viable state cause of action, but only a federal claim, he may not avoid removal by artfully casting his federal suit as one arising exclusively under state law."[21]

The first and best known specie of artful pleading is the one that arises when the area of state law upon which a plaintiff's claim is based has been "completely pre-empted" by federal law; i.e., when the "pre-emptive force of a statute is so 'extraordinary' that it 'converts an ordinary state law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule.' "[22]

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[21] *Id.* We note that another jurisprudentially created doctrine, more frankly labeled "fraudulent joinder," supports the assertion of removal jurisdiction on the basis of diversity of citizenship when a plaintiff's well-pleaded complaint would not otherwise allow removal because of the joinder of a non-diverse defendant. Even though we give great deference to the allegations found in the plaintiff's state court complaint, we will nevertheless examine the questioned joinder of a non-diverse defendant and hold it to be fraudulent under this doctrine when there is no possibility of recovery against that party. *See Dodson v. Spiliada Maritime Corp.*, 951 F.2d 40, 42 (5th Cir.1992); *Carriere v. Sears Roebuck and Co.*, 893 F.2d 98, 100 (5th Cir.1990). The parallel between the fraudulent joinder exception and the artful pleading exception should be obvious.

[22] *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393, 107 S.Ct. 2425, 2430, 96 L.Ed.2d 318 (1987) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 65, 107 S.Ct. 1542, 1547, 95 L.Ed.2d 55 (1987)).

Only a few types of claims have been held to be "completely pre-empted," though – most notably those pre-empted by Section 302 of the Labor Management Relations Act of 1947 or by Section 502 of the Employment Retirement Income Security Act of 1974.[23]

A second and somewhat rarer specie of artful pleading that justifies an exception is the one exemplified by the case we consider today, as illustrated in *Federated Department Stores v. Moitie*[24] – claim preclusion or res judicata. In Moitie, seven plaintiffs had filed and lost a consolidated antitrust suit in federal court.[25] Five of the seven plaintiffs appealed the district court decision, but two (Brown and Moitie) elected to file almost identical second suits (*Brown II* and *Moitie II*) in state court, facially based exclusively on state law. After the defendants removed these two state court suits, Brown and Moitie sought remand to state court. The district court first denied Brown's and Moitie's motions to remand, finding that their state court actions "were properly removed to federal court because they raised 'essentially federal law'

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[23] *See Avco Corp. v. Aero Lodge No. 735, Int'l Ass'n. of Machinists*, 390 U.S. 557, 559, 88 S.Ct. 1235, 1237, 20 L.Ed.2d 126 (1968) (§ 302 of LMRA); *Metropolitan Life*, 481 U.S. at 65-66, 107 S.Ct. at 1547-48 (§ 502 of ERISA).

[24] 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

[25] Six of the plaintiffs had originally filed their suits in federal court, and one plaintiff who originally filed suit in state court saw his action removed to federal court on federal question and diversity jurisdiction grounds. The district court found that all of the plaintiffs had failed to allege an "injury" to their "property or business" within the meaning of § 4 of the Clayton Act, 15 U.S.C. § 15. *Id.* at 395-96.

claims," then dismissed the claims on res judicata grounds.[26]

In the meantime, the Ninth Circuit had ruled in favor of the other original federal plaintiffs – the five who had appealed their district court losses – based on a supervening Supreme Court decision that had worked a substantive change in pertinent antitrust law. Consequently, when the two state court plaintiffs, Brown and Moitie, appealed the district court's denial of their motions to remand and its subsequent dismissals for res judicata, the Ninth Circuit reversed the district court on the merits of its res judicata determination, but – importantly – only after affirming the district court's assertion of removal jurisdiction and denial of remand.[27] The Supreme Court then granted *certiorari* to consider, specifically, the preclusion issues raised by the Ninth Circuit's res judicata analysis.[28]

Although the Supreme Court's decision was primarily focused on the substantive preclusion issues thus presented, the Court, of necessity, also affirmed the district courts' original assertion of removal jurisdiction over *Brown II* and *Moitie II* and the Ninth Circuit's affirmance of that jurisdiction. In a lengthy footnote, the Court stated:

> The Court of Appeals also affirmed the District Court's conclusion that *Brown II* was properly

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[26] *Id.* at 396-97.

[27] *Id.* at 397-98.

[28] *Id.* at 398 ("We granted certiorari . . . to consider the validity of the Court of Appeals' novel exception to the doctrine of res judicata.").

> removed to federal court, reasoning that the claims presented were "federal in nature." *We agree that at least some of the claims had a sufficient federal character to support removal.* As one treatise puts it, courts will not permit plaintiff to use artful pleading to close off defendant's right to a federal forum . . . [and that] occasionally the removal court will seek to determine whether the real nature of the claim is federal, regardless of plaintiff's characterization. 14 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3722, pp. 564-566 (1976) (citing cases) (footnote omitted). The District Court applied that settled principle to the facts of this case. . . . We will not question here that factual finding.[29]

Regrettably, the Supreme Court did not explain precisely what there was about the plaintiffs' state law claims that was so "federal in nature" as to support removal under the artful pleading exception.

Even though at least one district court and one commentator have suggested that *Moitie* should be disregarded either as an aberration that has never been confirmed by the Supreme Court or as an injudicious application of an already suspect doctrine,[30] the circuit courts have nevertheless attempted, as they must, to find

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[29] *Id.* at 397 n. 2 (emphasis added).

[30] *See Magic Chef, Inc. v. Int'l Molders & Allied Workers Union*, 581 F.Supp. 772, 776 n. 4 (E.D. Tenn.1983) (claiming that *Moitie*'s value as authority regarding removal jurisdiction was superseded by the Supreme Court's opinion in *Franchise Tax Bd.*, which was written by Justice Brennan, a vocal dissenter in *Moitie*, and which does not cite *Moitie* at all); Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 Hastings L.J. 273, 303-315 (1993).

meaning in *Moitie*'s enigmatic footnote. As it happens, different circuits have articulated one or the other of two distinct rationales for the Supreme Court's use of the artful pleading exception in its approval of the district court's denial of remand in *Moitie*.

One rationale was offered in *Travelers Indemnity Co. v. Sarkisian*,[31] in which the Second Circuit interpreted *Moitie* to permit removal whenever a plaintiff files a complaint based on federal law in federal court and subsequently files an ostensible state law claim in state court containing essentially the same elements. Consistent with the well-pleaded complaint doctrine, this "election of forums" or "consent" rationale recognizes in essence that a plaintiff remains the master of his complaint, but engrafts on this doctrine the limitation that the plaintiff is allowed but one opportunity to characterize his claims.[32]

Reasoning that the Second Circuit's "election of forums" rationale would lead to an unwarranted and excessive expansion of federal removal jurisdiction, the Ninth Circuit, in *Sullivan v. First Affiliated Securities, Inc.*,[33] concluded that *Moitie* is better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal

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[31] 794 F.2d 754, 760-61 (2nd Cir.), *cert. denied*, 479 U.S. 885, 107 S.Ct. 277, 93 L.Ed.2d 253 (1986).

[32] *See* Ragazzo, 44 Hastings L.J. at 307-308.

[33] 813 F.2d 1368, 1374-75 (9th Cir.), *cert denied*, 484 U.S. 850, 108 S.Ct. 150, 98 L.Ed.2d 106 (1987) (critiquing the election of forums rationale as applied in *Sarkisian* and as discussed in dicta of an earlier Ninth Circuit decision, *Salveson v. Western States Bankcard Ass'n*, 731 F.2d 1423 (9th Cir.1984)).

judgment.[34] As the Ninth Circuit later put it, a plaintiff's state law claim may be classified as " 'artfully pleaded' when it is drafted to avoid stating allegations or claims already resolved by a prior federal judgment."[35] In a number of subsequent cases, the Ninth Circuit, as well as other circuits, have endorsed *Sullivan*'s articulation of this "federal res judicata" rationale for *Moitie* and have applied *Sullivan*'s principles, all the while recognizing that this additional branch of the artful pleading exception must be used sparingly, in the narrow and exceptional circumstances described by *Sullivan* and *Moitie*.[36]

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[34] *Id.* at 1376 ("We therefore construe *Moitie* as limited to removal of state claims precluded by the res judicata effect of a federal judgment.").

[35] *Ethridge v. Harbor House Restaurant*, 861 F.2d 1389, 1403 (9th Cir.1988); *see also Clinton v. Acequia, Inc.*, 94 F.3d 568, 571 (9th Cir.1996) (stating that Ninth Circuit has consistently "found the artful pleading doctrine to support removal where a plaintiff files his state law claims in state court in an attempt to circumvent the res judicata effect of a prior federal claim that has been reduced to judgment").

[36] *See e.g., Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990) (acknowledging that *Sullivan* recognized a new basis for invoking the artful pleading doctrine but noting that recharacterization of a state court claim under the res judicata branch of the doctrine may only occur when prior federal judgment resolved issues of *federal* not *state* law); *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 912 (7th Cir.1993) (recognizing *Ultramar* distinction but also finding that removal was improper because no res judicata was present); *Ethridge*, 861 F.2d at 1403 (endorsing *Sullivan* but finding that removal was improper because federal court lacked subject matter jurisdiction over complaint in prior and allegedly preclusive federal action); *Redwood Theatres, Inc. v. Festival Enterprises, Inc.*, 908 F.2d 477, 480 (9th Cir.1990) (applying *Sullivan* rule but holding that

In *Carpenter v. Wichita Falls Ind. School District*,[37] a panel of this court squarely confronted the same interpretive issue presented to the Ninth Circuit by *Sullivan*.[38] Explicitly rejecting the Second Circuit's expansive election of forums approach and agreeing with the Ninth Circuit's "narrower interpretation,"[39] we concluded in *Carpenter* that the "federal character" of the plaintiffs' claims justifying removal in *Moitie* must be found in the federal law of preclusion.[40] In so doing we were careful to reiterate our continuing confidence that state courts would comply with their Supremacy Clause obligation to apply federal rules of res judicata.[41]

In addition, we emphasized our awareness that defendants in state court suits frequently have the option of employing the relitigation exception to the Anti-

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removal was improper because plaintiff's claim had never previously been before a federal court and no res judicata defense was available to defendants).

[37] 44 F.3d 362 (5th Cir.1995).

[38] In *Carpenter*, the plaintiff, a school administrator, filed two separate suits against the school district she worked for – one in federal court alleging violations of her free speech rights under the First Amendment to the United States Constitution and one in state court stating a state contract claim and a free speech claim exclusively under the Texas Constitution. 44 F.2d at 365. Similarly, *Sullivan* involved a federal action under federal securities law and another similar and simultaneous action in state court under state securities law. 813 F.2d at 1370.

[39] *Carpenter*, 44 F.3d at 369 n. 6, 370 n. 12.

[40] *Id.* at 370.

[41] *Id.*

Injunction Act,[42] as an alternative approach to disposing of a state court suit that is precluded by a prior federal judgment. The fact that a defendant could seek to enjoin a state court action and thereby, if successful, achieve the same result that he might have obtained had he instead sought to remove and dismiss the suit under *Moitie*, does not, Judge Garwood expressly observed in *Carpenter*, render *Moitie* superfluous. Rather, Judge Garwood went on to explain, the co-extensive nature of the relitigation exception to the Anti-Injunction Act on the one hand and the artful pleading exception to the well-pleaded complaint doctrine – based on *Moitie*'s federal res judicata grounds – on the other hand simply suggests that "any potential impact on federalism from removal [in *Moitie*] was not significant."[43] In thus clearly setting forth the rule for this circuit, the *Carpenter* panel concluded by stating that:

> [w]e *hold* that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law.[44]

Returning to the case now before us, we conclude that the district court properly reasoned that *Carpenter*'s holding provides the sole framework for analyzing the jurisdictional issues raised by the Mirannes' thinly veiled

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[42] 28 U.S.C. § 2283 ("A court of the United States may not grant an injunction to stay proceedings in a state court except . . . *to protect or effectuate its judgments.*") (emphasis added).

[43] *Id.*

[44] *Id.* (emphasis added).

collateral attack on the bankruptcy court's prior orders. The fact that in *Carpenter* the federal res judicata artful pleading rationale did not, in the end, support removal under the specific circumstances of that case – there was no prior federal case and no prior federal judgment, just two simultaneously filed suits, one based on federal law and one scrupulously – "artfully" – based solely on state law – does not, as the Mirannes now contend, render Judge Garwood's carefully articulated holding in *Carpenter* dicta. To the contrary, and just as the district court here found, *Carpenter* controls. Accordingly, if the defendants can show that the Mirannes' state court suit, purportedly brought to enforce their erstwhile second mortgage, is in fact barred by the claim preclusive effects of the bankruptcy court's 1986 orders that authorized and approved the sale of the leasehold estate free and clear of that mortgage and mandated its cancellation, then the district court's denial of the Mirannes' motion to remand, and its dismissal of their suit for essentially the same reason, must be affirmed.

C. The Bankruptcy Court's 1986 Orders Bar the Mirannes' Present Suit

Under the "pure" res judicata or claim preclusion rubric as developed in this circuit, a prior judgment will operate to preclude a later filed suit if four elements are present: (1) The parties in the later action are identical to, or at least in privity with, the parties in the prior action; (2) the judgment in the prior action was rendered by a court of competent jurisdiction; (3) the prior action concluded with a final judgment on the merits; and (4) the

same claim or cause of action is involved in both actions.[45] As we find beyond peradventure that all four elements subsist in the instant case, we conclude, just as did the district court, that the claims presented by the Mirannes' subsequent state court action, ostensibly seeking to enforce their second mortgage, are in fact precluded by the bankruptcy court's 1986 orders.

1. Identity and Privity of the Parties

The bankruptcy court's order authorizing the sale of the leasehold estate reflects that Edmond G. Miranne Jr., an attorney-at-law, appeared in court on the previous day, both pro se and as counsel for his father, in connection with the pending sale application by the trustee. The fact that the Mirannes' wives, Rivet and Winer,[46] did not personally appear and were not expressly identified by Miranne Jr. as parties that he represented, is of no significance. We have previously held that one individual's participation in a bankruptcy proceeding may bind a non-party, such as a spouse, whose interests are closely aligned with and adequately represented by the person who did appear.[47] Here, Rivet and Winer had interests identical to those of their husbands in the bankruptcy proceeding – namely the preservation (more accurately

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[45] *United States v. Shanbaum*, 10 F.3d 305, 310 (5th Cir.1994).

[46] In Louisiana, married women are entitled to retain and use their maiden names, and frequently do so in legal documents, such as deeds, mortgages, and pleadings, especially in New Orleans and the "country parishes" of South Louisiana. *See* La. Civ.Code art. 100.

[47] *Eubanks v. F.D.I.C.*, 977 F.2d 166, 170 (5th Cir.1992).

here, the resurrection) and protection of the second mortgage. In fact, their subsequent state court complaint listed only the husbands as owners of the collateral mortgage note, even though it was presumptively community property under Louisiana law.[48] Consequently, the husbands' participation in the 1986 bankruptcy proceedings by way of Edmond G. Miranne, Jr.'s appearance at the sale application hearing served as adequate representation of the interests of the spouses in community and was thus no less binding on the wives for claim preclusion purposes than it was on their husbands.[49]

With respect to the defendants, there is no dispute that FFB was a party to the bankruptcy proceedings as holder of the first mortgage and the eventual purchaser of the leasehold estate at the public auction. Neither is there doubt that Regions and FSA are successors-in-interest to FFB with respect to the property affected by the

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[48] *See* La. Civ.Code art. 2340 ("Things in possession of a spouse during the existence of a regime of community of acquets and gains are presumed to be community, but either spouse may prove that they are separate property.").

[49] Under Louisiana's community property laws, the rule of equal management generally applies to community property; however, the concurrence of both spouses is required for the alienation, encumbrance or lease of community immovables and in other limited situations specified by law. La. Civ.Code arts. 2346-47. As the collateral mortgage note held by the Mirannes is classified as an "incorporeal movable," concurrence of the Mirannes' spouses would not have been required for the husbands to alienate whatever rights flowed from their ownership of the note and the mortgage securing it. *See* Nathan, 49 La. L.Rev. at 44.

bankruptcy court orders. Again, the rule is well established that a judgment may have claim preclusive effect on a non-party if the non-party is a successor-in-interest to a party's interest in property affected by the judgment.[50] Consequently, both Regions and FSA are bound by the bankruptcy court's orders to the same extent as is their predecessor, First Financial. Accordingly, we conclude that the first element of claim preclusion is clearly satisfied in this case with respect to all four plaintiffs and to defendants Regions and FSA.[51]

2. *A Court of Competent Jurisdiction and A Final Judgment*

The second and third claim preclusion elements are also present in the instant case. As a general proposition, district courts have jurisdiction over cases or civil proceedings arising under Title 11, or arising in or related to cases under Title 11.[52] It follows that a district court has jurisdiction to authorize and approve a trustee's sale.[53]

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[50] *Meza v. General Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir.1990); *Howell Hydrocarbons, Inc. v. Adams*, 897 F.2d 183, 188 (5th Cir.1990).

[51] We acknowledge that this first condition of claim preclusion cannot be satisfied with respect to the Browns, but we dispose of the jurisdictional wrinkle raised by this fact below. *See infra* Part E.

[52] 28 U.S.C. § 1334(a),(b).

[53] *Southmark Properties v. Charles House Corp.*, 742 F.2d 862, 870 (5th Cir.1984); *In re Heine*, 141 B.R. 185, 187 (Bank.D.S.D.1992); *see also Matter of Baudoin*, 981 F.2d 736, 740 (5th Cir.1993) (recognizing wide reach of jurisdiction under Title 11).

Indeed, a proceeding to sell property free and clear of liens pursuant to 11 U.S.C. § 363(b) and (f) is a core proceeding in which the bankruptcy court has jurisdiction to issue final orders and judgments.[54] Here the proposed sale of the leasehold interest arose under and was related to THILP's chapter 7 bankruptcy case. Consequently, the bankruptcy court had jurisdiction to consider the Trustee's sale application and to issue the ensuing orders (1) authorizing the sale of the leasehold estate free and clear of specified junior liens, expressly including the second mortgage held by the Mirannes, and (2) approving that sale and directing the cancellation of those specified inferior encumbrances.

Although they characterize the bankruptcy court's sale orders as actions beyond the "power" of the bankruptcy court under the rules and provisions of the Bankruptcy Code,[55] the Mirannes' authority for this proposition does not comport with Congress' jurisdictional grant to the district court – and its adjunct, the bankruptcy court – to determine whether property of a debtor should be sold free and clear of liens and encumbrances. The Mirannes, of course, were entitled to question whether the bankruptcy court properly exercised the powers granted to it by 11 U.S.C. § 363 in the

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[54] 28 U.S.C. § 157(a),(b)(2)(N); *Heine*, 141 B.R. at 188.

[55] Appellants principally contend that the bankruptcy court order extinguishing the second mortgage was invalid because the order did not result from an adversary proceeding as required by Fed. R. Bank. Proc. 7001 and because the court did not satisfy the provisions of § 363(f)(1)-(5).

particular circumstances of this case. This kind of substantive – but *not* jurisdictional – objection to a bankruptcy court's orders, however, is one that had to have been timely raised either in an appeal or a motion for reconsideration, not eight years after the fact in a state court collateral attack on those orders. We reject out of hand the Mirannes' specious contention that, for claim preclusion purposes, the bankruptcy court lacked jurisdiction to issue the 1986 sale orders.

In addition, an order by a bankruptcy court authorizing or approving the sale of an asset of the bankrupt estate is a final judgment on the merits for res judicata purposes even if the order neither closes the bankruptcy case nor disposes of any claim.[56] Therefore, there can be no serious question that the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of essentially all liens and encumbrances were final judgments capable of precluding the Mirannes' later filed state court collateral attack. It is equally beyond serious question that these final judgments affected issues of federal law: Bankruptcy is a quintessential federal question.

3. *The Same Cause of Action*

In conducting our search for the presence of the fourth element required for the applicability of claim preclusion, we employ the transactional test of Section 24

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[56] *Matter of Baudoin*, 981 F.2d at 742; *Hendrick v. Avent*, 891 F.2d 583, 586 (5th Cir.), *cert. denied*, 498 U.S. 819, 111 S.Ct. 64, 112 L.Ed.2d 39 (1990); *Southmark Properties*, 742 F.2d at 870.

of the *Restatement (Second) of Judgments* to determine whether the two suits in question involve the same claim for purposes of claim preclusion.[57] Under the "same claim" inquiry, the critical issue is whether the two actions under consideration are based on the *same nucleus of operative facts*.[58]

In the instant case, we find that both the bankruptcy court's 1986 orders authorizing and approving the sale of the leasehold estate free and clear of the Mirannes' second mortgage and the Mirannes' claims in their state court action are unquestionably based on, and in fact are entirely dependent on, the same nucleus of operative facts – namely, the viability, the validity, the enforceability of the second mortgage. In "artfully" contending that their putative state cause of action arises solely out of the December 1993 transaction involving the Browns, Secor and FSA, the Mirannes studiously ignore the fact their claim relative to that 1993 transfer can go absolutely nowhere unless they can establish that their second mortgage was alive and well at that time, despite the 1986 bankruptcy court orders that expressly authorized and approved the sale of the leasehold estate free and clear of that mortgage and directed that it be canceled from the mortgage records of Orleans Parish.

Without an extant enforceable mortgage, the Mirannes cannot forthrightly plead either a right of action or a cause of action in state court. Indeed, all of the acts of

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[57] *Matter of Baudoin*, 981 F.2d at 743; *Southmark Properties*, 742 F.2d at 870-71.

[58] *Matter of Baudoin*, 981 F.2d at 743.

alleged wrongdoing in the December 1993 transaction are so inextricably intertwined with and dependent on the 1986 bankruptcy orders directing and approving the sale of the leasehold estate free and clear of the second mortgage that we would be hard pressed to conjure up a better hypothetical example of two actions arising from the same nucleus of operative facts. In this regard we remain ever mindful of the basic canon of Louisiana law that the public records do not create rights; the existence of the uncanceled *inscription* of the second mortgage on the public records could not keep the mortgage itself legally viable after the obligation it secured – the collateral mortgage note – as well as the mortgage, were terminated in the bankruptcy of the maker/mortgagor, THILP.

A review of relevant case law applying res judicata principles in the bankruptcy context further confirms our analysis. On one hand, our decisions have consistently held that under the transactional test a final bankruptcy court *sale* bars any subsequent claims that challenge the finality or integrity of the transfer of title pursuant to that sale.[59] On the other hand, the Mirannes' reliance on *D-1 Enterprises, Inc. v. Commercial State Bank*,[60] a case in which we held that res judicata does *not* apply to claims that

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[59] *See Southmark Properties*, 742 F.2d at 870-72 (debtor's later filed lender liability action barred by bankruptcy court's order authorizing sale of property in debtor's estate "free and clear of all . . . claims" to secured creditor as both involved "common nucleus of operative facts"); *Hendrick*, 891 F.2d at 587 (trustee's actions under RICO and securities laws barred by bankruptcy court's sale order authorizing transfer of title of stock against which trustee had launched his collateral action).

[60] 864 F.2d 36 (5th Cir.1989).

were largely unrelated to and which could not have been raised in an earlier bankruptcy proceeding, is inapposite to the instant case. Unlike the situation in *D-1 Enterprises*, here the Mirannes had far more than a mere opportunity to object to the sale of the leasehold estate in the bankruptcy court: They were invited by the court to file their objections; they actually appeared in court at the hearing scheduled for the airing of such objections; and once the court issued its sale order, they could have timely filed either a motion for reconsideration – or a notice of appeal – but they did neither. Given their personal attendance, together with these multiple waived or forfeited opportunities to raise and litigate their objections (if any) to the sale, the Mirannes cannot now contend – at least not with a straight face – as did the debtor in *D-1 Enterprises*,[61] that claim preclusion should not be applied because their claim could not have been effectively litigated in the earlier proceeding.

Indisputably, all requisites of claim preclusion are present here, vis-á-vis Regions and FSA. As to these two defendants, therefore, we affirm the district court's refusal to remand the Mirannes' previously removed action under the artful pleading exception to the well-pleaded complaint doctrine.

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[61] In *D-1 Enterprises*, we found that the lender liability claims that debtor sought to assert in the later action were not "direct defenses" that the debtor could or should have litigated in response to the creditor's earlier motion for relief from stay. *Id.* at 39. Furthermore, *D-1 Enterprises* also distinguished *Southmark* in which preclusion was appropriate in the context of a "court-ordered public cash auction." *Id.*

D. The "Actually Litigated" Standard

As we noted above, and as this court previously observed in *Carpenter*, the relitigation exception to the Anti-Injunction Act provides another, entirely independent mechanism which defendants (and the federal courts) may use to protect prior federal court judgments.[62] In *Carpenter* we reasoned that, as the relitigation exception to the Anti-Injunction Act had "already realigned federal-state relations in favor of the federal courts," *Moitie's* use of the res judicata branch of the artful pleading exception signified nothing more than that "any potential impact on federalism from removal was not significant."[63] Thus two lessons are to be gleaned from *Carpenter*: (1) Issues of federalism are not implicated in this context; and (2) the relitigation exception to the Anti-Injunction Act – a route that parallels (but is not identical to) removal via the res judicata iteration of the artful pleading exception – is not the exclusive path available for squelching precluded sequential state court litigation of claims previously litigated in federal court.

Nevertheless, in reliance on the above-quoted limited discussion of how the Anti-Injunction Act co-exists with the federal res judicata interpretation of *Moitie*, the Mirannes imaginatively contend that the court in *Carpenter* implicitly incorporated the specific restraints of the relitigation exception into its res judicata artful pleading exception based on *Moitie*. In particular, they contend that removal under *Carpenter* is somehow limited by the

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[62] *See supra* Part B, *and* 44 F.3d at 370.

[63] *Id.*

anti-injunction holding in *Chick Kam Choo v. Exxon Corp.*[64] The Mirannes argue that *Chick Kam Choo* stands for the proposition that injunctions may be issued under the relitigation exception to § 2283 only with respect to issues that were "actually litigated" in the prior proceeding – that is, only in circumstances in which *issue* – but not claim – preclusion would apply in a successive proceeding; and that such a limitation must per force restrict the artful pleading exception to issue preclusion. This stretch by the Mirannes, in attempting to incorporate an "actually litigated" restriction into *Carpenter*, is fatally flawed, however.

First, we note that nowhere in *Carpenter* did we even mention, much less impose, an "actually litigated" standard for removal under the res judicata branch of the artful pleading exception; neither did we so much as refer to *Chick Kam Choo*, much less cite it as authority. Second, we are aware of no other court that, when applying the federal res judicata manifestation of the artful pleading exception following *Sullivan*, has seen fit to apply – or even mention – this standard.

But even if we assume, solely for the sake of argument, that an "actually litigated" requirement was imported through *Carpenter*, we would still find that removal is proper under the circumstances of this case. In *Chick Kam Choo*, the Supreme Court, relying on *Atlantic Coast Line R. Co. v. Locomotive Engineers*,[65] stressed that:

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[64] 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988).

[65] 398 U.S. 281, 286-287, 90 S.Ct. 1739, 1742-43, 26 L.Ed.2d 234 (1970).

> an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings *actually have been decided* by the federal court. Moreover, Atlantic Coast Line illustrates that this prerequisite is strict and narrow. The court assessed the precise state of the record and what the earlier federal order *actually* said; it did not permit the District Court to render a post hoc judgment as to what the order was *intended* to say.[66]

For the bankruptcy court in the instant case to authorize and approve the sale of the leasehold estate free and clear of essentially all liens and encumbrances, that court necessarily had to *decide* whether the Mirannes' inferior second mortgage could survive as an encumbrance against the leasehold estate after that estate was sold at public auction by the THILP trustee's foreclosure on the superior first mortgage. Indeed, the bankruptcy court's order authorizing sale of the leasehold estate "*actually* said," inter alia, that (1) Edmond G. Miranne, Jr. appeared on his and his father's behalf, (2) all creditors were given notice and an opportunity to object and be heard, and (3) the sale of the leasehold estate would be free and clear of "all . . . liens, mortgages and encumbrances," including, specifically, the Mirannes' second mortgage. Given *Chick Kam Choo's* admonition to focus on "what the earlier federal order *actually* said," not what "the order *intended* to say" (albeit likely the same thing in this case), it is

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[66] *Chick Kam Choo*, 486 U.S. at 148, 108 S.Ct. at 1690-91 (emphasis in original).

indisputable that in the 1986 bankruptcy court proceedings the continuing validity of the Mirannes' inferior mortgage was "actually litigated and decided."[67]

E. Response to Dissent

Although our colleague, Judge Jones, in her thoughtful dissent agrees with our essential holding that *Moitie* permits removal of state court claims that are barred by the preclusive res judicata effect of a prior federal judgment, she would further limit application of *Moitie's* res judicata removal avenue to cases in which (1) "the prior judgment . . . involved a claim *made* under federal law," and (2) "the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an 'essentially federal' claim they [sic] had *unsuccessfully pursued first in federal court.*"[68] We acknowledge the overarching federalism concerns that inform Judge Jones' critique, but we nevertheless find her additional suggested restrictions to our already narrow holdings in *Carpenter* and in the instant case to be unwarranted. First, the Ninth Circuit decision that Judge Jones cites in support of her additional restrictions, *Ultramar America Limited v. Dwelle*,[69] limits *Moitie* recharacterization (i.e., removal) to situations "when the prior federal judgment *resolved* questions of federal law," or "when the prior federal judgment *sounded* in federal law."[70] It does not, as far as

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[67] *Id.* at 149, 108 S.Ct. at 1691.

[68] Dissent, *infra*, at 2358 (emphasis added).

[69] 900 F.2d 1412 (9th Cir.1990).

[70] *Id.* at 1415-16 (emphasis added).

we can discern, purport to constrain *Moitie* removal to instances in which the *prior federal judgment* arose out of a case that a plaintiff himself had first *brought* in federal court. True, that is what happened in *Moitie* and that may prove to be the most common circumstance in which *Moitie* removal will occur. But *Moitie's* sanctioning of removal, as we explained in *Carpenter*[71] and as the Ninth Circuit has suggested,[72] hinges on the *preclusive effects* of a *prior federal judgment* and a state court litigant's attempts to circumvent them artfully, *not* on the manner in which the case giving rise to the preclusive federal judgment reached federal court in the first place.

Indeed, we emphasize that the reasons Judge Garwood found in *Carpenter* that *Moitie* did not apply to the facts before his panel there were (1) there was no prior federal judgment to protect, (2) there was no federal preclusion law to apply, and (3) the plaintiff in *Carpenter*, unlike the plaintiffs in *Moitie*, was "taking preclusion risks in order to have her state law claim heard in its

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[71] 44 F.3d at 370 ("If there was any federal character at all to the plaintiffs' state law claims in *Moitie*, it must be the federal law of preclusion.")

[72] In *Ultramar*, the Ninth Circuit observed that:

> The *Moitie* doctrine seems based on a court divining a litigant's motives for bringing suit. When a litigant suffered a final defeat on a federal claim yet thereafter files a similar-although-not-preempted state claim in state court, the sequence of events gives rise to an inference that the litigant is not interested in the state cause of action per se, but is instead attempting *to circumvent the effects of the federal question judgment*. In this limited instance, removal is allowed.

900 F.2d at 1417 (emphasis added).

preferred forum" and thus was "not attempting to avoid the effect of a prior judgment."[73] As we have strived to make clear in this opinion, however, in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks, but, to the contrary, are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment, long since in repose, that concluded a case in which these plaintiffs had ample opportunity to assert their interests and in fact did assert them. It follows, then, that removal of the plaintiffs' state court collateral attack on the bankruptcy court's final judgment is entirely appropriate in this case, even though the preclusive – and thus essentially federal – nature of that federal court judgment derived from the underlying bankruptcy case. Here, the plaintiffs were interested creditors who were invited to assert their rights based on their second mortgage; there simply was no lawsuit initially filed by these plaintiffs in federal court. Therefore, in spite of Judge Jones' objections, we remain firmly convinced that the Mirannes are not entitled to have their faux foreclosure suit remanded to state court under the well-pleaded complaint doctrine. To do so would make a mockery of that doctrine; the very kind of untoward result that the artful pleading exception – like the fraudulent joinder doctrine – is designed to prevent.

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[73] *Carpenter*, 44 F.3d at 371.

F. The Final Removal Twist – Supplemental Jurisdiction Over the Mirannes' Claims Against the Browns

To complete our analysis of the jurisdictional questions presented by this case, we address one final, relatively minor issue. The Mirannes insist that, even if the district court properly asserted removal jurisdiction as to Regions and FSA and properly denied remand as to those two defendants under the *Moitie/Carpenter* res judicata artful pleading exception, that court still could not exercise removal jurisdiction over the Mirannes' claims against the Browns. This is so, they urge, because the Browns were not parties to the 1986 bankruptcy proceedings that underlie the preclusion of the Mirannes' subsequent state court suit against FSA and Regions. We disagree. Although we do agree that the *Moitie/Carpenter* rationale is inapplicable to the Browns, the district court – having properly exercised *removal* jurisdiction as to the Mirannes' claims against Regions and FSA – could therefore exercise *supplemental* jurisdiction over the Mirannes' claims against the Browns. These claims clearly formed part of the "same case or controversy" as those against Regions and FSA.[74] Indeed, we have so found in a similar case involving the complete preemption branch of the artful pleading exception.[75]

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[74] *See* 28 U.S.C. § 1367.

[75] *See Kramer v. Smith Barney*, 80 F.3d 1080, 1086 & 1083 n. 1 (5th Cir.1996) (observing that if plaintiff's state law fiduciary duty claims relating to ERISA governed pension accounts were removable under complete preemption theory, plaintiff's other related, non-ERISA, state law claims were removable as supplemental claims under § 1367).

Accordingly, we hold that the district court did not err in asserting jurisdiction over each defendant named in the Mirannes' state court complaint, including the Browns. Neither did that court err in refusing to remand any of those claims to state court.

G. Motions for Summary Judgment

In the foregoing analysis, we determined that the Mirannes' removed state court suit, "artfully" styled as an action to enforce the second mortgage, was in truth nothing but a transparent, "second bite" collateral attack on the bankruptcy court's 1986 orders. It was a blatant attempt at a "gotcha," grounded exclusively in the purely fortuitous and inadvertent failure of some person or persons unknown to follow-up on the court ordered cancellation of the second mortgage from the public records. As a result, we concluded that the well-pleaded complaint doctrine did not immunize that second suit from removal.

In like manner, we now hold that the district court properly granted summary judgment in favor of Regions and FSA on the basis of claim preclusion. Despite its intentionally deceitful garb, the core issue of the Mirannes' subsequent state court complaint was the efficacy of the final, executory, non-appealable orders of the bankruptcy court that had freed the leased premises from, inter alia, the Mirannes' second mortgage. As that issue was and remains res judicata, we affirm the district court's summary judgment in favor of Regions and FSA.

We also affirm the district court's grant of summary judgment in favor of the Browns albeit we do so on the

separate and independent ground that the Mirannes failed to establish any legal basis or triable issue of fact to support a claim against the Browns. As the district court observed, the Mirannes first acknowledged that the Browns did not participate in the prior bankruptcy proceedings, thereby casting doubt on whether the Browns could be held responsible for the Mirannes' loss of rights as a result of those proceedings. In addition, the Mirannes also characterized their action as one *in rem*, i.e., a claim to a right in the property, not one *in personam* against its *former* owners, thus precluding any personal liability on the Browns' part.[76] In sum, as the Browns had no contractual relationship at all with the Mirannes and had long since ceased to have any interest in the property which the Mirannes doggedly contend is still encumbered by their second mortgage, the Browns can have no personal liability to the Mirannes whatsoever. The district court properly granted the Browns' motion for summary judgment.

III

CONCLUSION

As should now be apparent from the foregoing analysis, we conclude that the district court correctly held

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[76] *See Louisiana Nat. Bank of Baton Rouge v. O'Brien*, 439 So.2d 552, 556-58 (La.Ct.App. 1st Cir.1983), *writ denied*, 443 So.2d 590 (La.1983) (holding that note marked "in rem" gave maker no liability at all beyond property itself and that creditor was unable to maintain any action against maker to reach any of maker's other assets).

that the Mirannes are not entitled to have their previously removed state court suit remanded to state court under the well-pleaded complaint doctrine. The claim preclusion or res judicata branch of the artful pleading exception to that doctrine demonstrates beyond cavil that their state court suit, filed subsequent to the final judgments of the bankruptcy court on issues of federal law, need not be remanded. For essentially the same reasons, our de novo review of the district court's summary judgment dismissal of the Mirannes' claims against Regions and FSA satisfies us that the Mirannes' subsequent state court action, as removed to federal district court, is barred by res judicata. In like manner the court's exercise of supplemental jurisdiction over the claims against the Browns, and its dismissal of those claims, were not erroneous. Therefore, the district court's orders and judgment from which the Mirannes appeal are, in all respects,

AFFIRMED.

EDITH H. JONES, Circuit Judge, dissenting:

My brethren, conscientiously attempting to follow the guidance of *dicta* in a Fifth Circuit case[1] and a mystifying footnote by the Supreme Court,[2] have concluded that the federal district court possessed removal jurisdiction over a state court claim principally seeking foreclosure of a second mortgage. Were it not for the ambiguities in the two preceding cases, *Carpenter* and

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[1] *Carpenter v. Wichita Falls Independent School Dist.*, 44 F.3d 362 (5th Cir.1995).

[2] *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981).

Moitie, this result would fly in the face of the well-pleaded complaint limit on removal jurisdiction. I respectfully dissent because I believe the majority's unusual result is not compelled by the authorities. Briefly, *Moitie* means less than the majority asserts, and the *Carpenter dicta* explaining *Moitie* do not require the result here reached. I fear that the majority's result further confuses an already complex byway of federal jurisdiction.

Without repeating the majority's analysis, I agree in part with their holding that – until the Supreme Court clarifies *Moitie* – *Moitie* is "better explained as permitting removal of only those subsequent state court claims that are barred by the res judicata effect of a prior federal judgment." Critically, I would add that the prior judgment should have involved a claim made under *federal* law. *Ultramar America Limited v. Dwelle*, 900 F.2d 1412, 1415 (9th Cir.1990).[3] I would also emphasize that *Moitie* permitted removal only where the claim being removed represented a plaintiff's attempt to seek relief in state court by recharacterizing an "essentially federal" claim

[3] The majority argues that the *Ultramar* decision does not "purport to constrain *Moitie* removal to instances in which the *prior federal judgment* arose out of a case that a plaintiff himself had first *brought* in federal court." Maj. Op. at 2355 (emphasis in original). However, *Ultramar* did involve a plaintiff who had asserted a prior claim, and the majority has cited no case where *Moitie* removal has been allowed where the plaintiff had not brought a prior suit grounded in federal law. The majority implicitly acknowledges that while it is not "constrain[ed]" from allowing *Moitie* removal where the plaintiff has not brought a prior claim, it is broadening the scope of *Moitie* removal beyond what has been allowed in other circuits.

that they had unsuccessfully pursued first in federal court. *Moitie* thus is a species of the artful pleading doctrine, a doctrine that permits a federal court to pierce the pleadings of a complaint which, although cloaked in terms of state law, actually falls within federal jurisdiction because of the applicability of federal principles. *Moitie*, 452 U.S. at 398, n. 2, 101 S.Ct. at 2427, n. 2. While the circuit courts have split in interpreting *Moitie*,[4] this narrow understanding is accepted by the majority here and the Fifth Circuit and is well-grounded.[5]

[4] *Compare Travelers Indemnity Co. v. Sarkisian*, 794 F.2d 754 (2d Cir.1986) (using plaintiff's choice of forum analysis to apply *Moitie*) *and Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368 (9th Cir.1987) (using res judicata analysis).

[5] The Supreme Court's statement in *Moitie* that "at least some of the claims had a sufficient character to support removal" should be interpreted in light of the authority and examples cited in support of that proposition. 452 U.S. at 397, n. 2, 101 S.Ct. at 2427, n. 2. After citing Professor Wright's treatise for the proposition that federal courts may determine the "real nature" of a plaintiff's claim, the Court cited three cases in which courts did just that. Two were antitrust cases in which plaintiffs had pleaded antitrust claims under a South Carolina statute and the South Carolina courts had held that the statute only applied to conduct in *intrastate* commerce, while the defendants' challenged conduct actually involved *interstate* commerce. *See In re: Wiring Device Antitrust Litigation*, 498 F.Supp. 79, 82-83 (E.D.N.Y.1980) *and Three J Farms, Inc. v. Alton Box Board Company*, 1979 – 1 Trade Cases ¶ 62,423, 1978 WL 1459 (D.S.C.1978), *rev'd on other grounds*, 609 F.2d 112 (4th Cir.1979), *cert. denied*, 445 U.S. 911, 100 S.Ct. 1090, 63 L.Ed.2d 327 (1980). In the third case, the plaintiff filed only state conspiracy claims, but the district court held that the claims implicated federal antitrust laws and labor issues governed by the Labor Management Relations Act. *See Prospect Dairy, Inc. v. Dellwood Dairy Co.*, 237 F.Supp. 176, 178-79 (N.D.N.Y.1964).

But accepting this explanation of *Moitie*, that case cannot confer federal jurisdiction here, because the plaintiffs have no "essentially federal" claim to recharacterize. Their claim rests on purported rights under a second mortgage and on transfers of property interests that allegedly abrogated those rights. This is a state law claim. The only federal element that plaintiffs could have pleaded is an anticipatory defense based upon the prior bankruptcy proceeding. To fall within footnote 2 of *Moitie*, the subsequent state claim must be "merely the same . . . claim in disguise." *Salveson v. Western States Bankcard Ass'n.*, 731 F.2d 1423, 1427 (9th Cir.1984) (characterizing lower court's finding in *Moitie*). The plaintiffs here are not recharacterizing any federal claim. Instead, the second mortgage they seek to enforce was never expunged from the local deed records after a bankruptcy court judgment commanded sale free and clear of all liens and encumbrances. Moreover, the plaintiffs are suing a successor in interest to the bankruptcy sale, not simply the original party to the proceeding in bankruptcy court. Also unlike *Moitie*, the plaintiffs here were not unsuccessful plaintiffs in the prior bankruptcy proceeding, but were defendants there. In every respect, these characteristics represent a more complex procedural scenario than did the *Moitie* plaintiff's copycat pleadings in federal and then state court.

Given my druthers, I would hold that the instant case is distinguishable from a narrow reading of *Moitie*. If, however, *Moitie* compels the result reached by the majority, then it appears significantly to have intruded into previously well-settled removal jurisprudence, whose anchor is the well-pleaded complaint rule. Consider this

hypothetical: A sues B in federal court on a federal securities claim and wins a judgment. B then sues A in state court on a contract claim that was arguably a compulsory counterclaim in the preceding litigation. Following *Moitie* as interpreted by *Rivet*, does the federal court have removal jurisdiction? If so, hasn't *Rivet* moved the boundaries of removal jurisdiction far away from *Moitie's* self-description as an "artful pleading" case?

The majority relies heavily on Judge Garwood's description of *Moitie* in the *Carpenter* decision. Notwithstanding *Carpenter's* statement that "we *hold* that *Moitie* should apply only where a plaintiff files a state cause of action completely precluded by a prior federal judgment on a question of federal law," 44 F.3d at 370 (emphasis added), *Carpenter's* statement is more *dicta* than holding. *Carpenter* was a very different case from *Moitie*. The defendants in *Carpenter* sought to rely on *Moitie* to prevent simultaneous litigation by a plaintiff in federal and state courts over the same grievance. Judge Garwood's extended, scholarly discussion of *Moitie* refused to adopt the proffered broad interpretation of *Moitie* that arguably would have prevented parallel litigation. As Judge Garwood put it, "whatever *Moitie* does mean, we are confident it does not mean so much." 44 F.3d at 368. The bulk of *Carpenter's* discussion explains why some circuit court cases have incorrectly construed *Moitie* to govern parallel litigation.[6] The *Carpenter* panel was not faced with anything like a plaintiff whose suit was in fact "completely precluded by a prior federal judgment on a question of

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[6] *See* 44 F.3d at 368-70, n. 6, n. 12 (disagreeing with the second circuit decision in *Travelers, supra*, n. 3)

federal law." This "holding" was merely a way to distinguish the cryptic *Moitie* footnote without "empty[ing] footnote 2 of all substantive content," and was surely not meant to broaden the *Moitie* decision's fleeting reference to the "federal character" of the plaintiff's claims into a completely new exception to the well-pleaded complaint rule. *See id.* at 370, n. 11.

In attempting to demonstrate that the factors relied upon by Judge Garwood in *Carpenter* to allow remand are not present here, the majority contends that "in this case we do have a prior federal judgment, we do have federal preclusion law to apply, and we have plaintiffs who have not taken any preclusion risks . . . but . . . are clearly seeking by collateral attack to avoid the preclusive effect of a prior federal judgment. . . . " Maj. Op. at 2355. I would hasten to add to that list what we also do not have in this case, but was essential in *Moitie* and obviously present in *Carpenter*: a conceivable federal claim that could be asserted by the plaintiff. The majority essentially holds that a *conceivable federal claim is not necessary for removal*, as long as there is a federal defense of res judicata based on a federal judgment. To say that a plaintiff's claim can be removed to federal court when he has alleged no conceivable federal claim is true mockery of the well-pleaded complaint rule and the artful pleading doctrine. How can the artful pleading doctrine apply if the plaintiff's claims can not be recharacterized into an essentially federal claim that has been omitted by artful pleading? *See Ultramar*, 900 F.2d at 1415 (" . . . recharacterization of purported state-law claims into federal claims was essential before removal could occur.").

Moreover, *Carpenter* expresses a fear of extending federal court removal jurisdiction that is realized in this case. Referring to the fact that plaintiff Carpenter could pursue litigation under theories of both federal and state constitutional law, Judge Garwood pithily observes, "we cannot say that the failure to make a state claim pendent makes it federal." *Id.* at 369. Here, whether we like it or not, and whether the plaintiffs proceeded in good faith or not, they have filed a claim that is based purely and solely on state law. It is not amenable to recharacterization as an "artful pleading" of a federal claim. In my view, *Carpenter* expressly decries the implication that this state-law claim must be removed to federal court according to a broad interpretation of *Moitie*.

Any reader who has followed the majority opinion and this dissent thus far ought to appreciate that our dispute, while technical, is not trivial.[7] The principles of limited federal court jurisdiction and the relative clarity of jurisdictional rules are at issue. *Moitie* and *Carpenter* can be read to authorize removal of this state-law-based case simply because it is subject to a federal preclusion

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[7] The majority's holding has another unfortunate consequence. Allowing federal jurisdiction to turn on whether the plaintiff's claims are barred by res judicata allows the defendant two bites at the apple: if upon the plaintiff's motion to remand the defendant loses the res judicata issue and the case is remanded, the defendant can relitigate the res judicata issue again in state court. The prior federal determination of the res judicata issue will not bind the state court, because, by virtue of the federal court's resolution of the res judicata issue, the federal court was not a court of proper jurisdiction. *See* Robert A. Ragazzo, *Reconsidering the Artful Pleading Doctrine*, 44 HASTINGS L.J. 273, 311 (January 1993).

defense. But to do so, as I have shown, intrudes on the scope of the well-pleaded complaint rule, expanding federal removal jurisdiction while engendering complexity and uncertainty in the future. I do not believe such results were intended by the Supreme Court in *Moitie* or by the *Carpenter* panel; the best way to effectuate those decisions' narrowly tailored goals is to apply them narrowly and specifically. Because the majority opinion does not do so, I respectfully dissent.

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

September 29, 1997

Linda V. Farrer
Suite 401, Realty Building
24 Drayton Street
Savannah, Georgia 31401

96-1971 – Mary Anna Rivet, et al. v.
Regions Bank, et al.

Dear Ms. Farrer:

The Court today entered the following order in the above stated case:

> The petition for a writ of certiorari is granted. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply.

Enclosed are Memoranda describing the procedures under the Rules of the Court, together with a Specification Chart for your use. To further assist you in preparing your case before this Court, a copy of the Guide for Counsel is enclosed. Please note that requests for extensions of time to file briefs on the merits are not favored.

If you have any questions, please feel free to telephone me.

Very truly yours,

WILLIAM K. SUTER, CLERK

/s/ Sandy Nelsen
Sandy Nelsen
Merits Clerk
(202) 479-3032

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

MEMORANDUM TO COUNSEL IN CASES
GRANTED REVIEW ON
September 29, 1997

The attention of counsel of record in cases granted review on the above date is directed to the following:

1. Unless expedited by the Court, your case will probably be calendared for oral argument in the January session of the Court. Counsel will be advised several weeks in advance of the argument date.

2. The petitioner's or appellant's brief on the merits is due 45 days from Sept 29 1997. The respondent's or appellee's brief on the merits is due ~~30 days after receipt of the brief of the petitioner or appellant.~~ December 15, 1997 (3 p.m.) See special order of briefing schedule. Rule 25.

3. If the certified record of the proceedings below has not been transmitted to this Court, the Clerk will in the near future request the clerk of the court having possession of the record to certify and transmit it pursuant to Rule 12.7. The Clerk will delay making this request for a reasonable period of time to permit counsel to have access to the record locally for purposes of preparing the joint appendix.

4. The joint appendix must be printed and filed on or before 3 pm November 13, 1997. Counsel for the petitioner or appellant is primarily responsible for preparing and printing the joint appendix. Work should begin *immediately*. The Court strongly urges counsel to agree quickly on the contents of the joint appendix. Rule 26.

5. If no agreement on the contents of the joint appendix is reached, counsel for the petitioner or appellant must designate those portions of the record to be printed by October 9 1997, and counsel for the respondent or appellee must cross-designate by October 20, 1997. <These dates *must* be adhered to.> No cross-designations may be made by petitioner or appellant. Counsel for the petitioner or appellant should keep the Clerk advised of the date any agreement is reached, or the dates when the designation and cross-designation are actually made, as well as the date when the designated portions of the record are sent to the printer. Copies of the designations need not be forwarded to the Clerk.

6. In designating the portions of the record to be printed in the joint appendix counsel should remember that the entire record is available to the Court for reference and examination. Only

those portions of the record directly relevant to the issues being briefed should be printed. The briefs of the parties can cite and rely upon portions of the record that have not been designated for printing in the joint appendix. Rule 26.2.

* * *

8. In preparing and printing the joint appendix counsel for the petitioner or appellant should follow the instructions contained in the attached memorandum on "Printing the Joint Appendix."

9. The form and content of the briefs on the merits and the joint appendix are governed by Rules 24, 26, and 33.1. The text shall be typeset (e.g., wordprocessing, electronic publishing, or image setting) and reproduced by offset printing, photocopying, or similar process. The text shall be standard 11-point or larger type with 2-point or more leading between lines. The type size and face shall be no smaller than that contained in the United States Reports beginning with Volume 453. Briefs shall not exceed 50 pages. Type size and face shall be consistent throughout. No attempt shall be made to reduce, compress, or condense the typeface in a manner that would increase the content of a document. See Rule 33.1(b) concerning quotations and footnotes. The previous Rules permitted "typewritten" briefs that were double spaced and not more than 110 pages in length. The revised Rules, effective May 1, 1997, do not allow "typewritten" briefs.

10. The brief on the merits for petitioner or appellant must have a *light* blue cover, the brief for the respondent or appellee must have a *light* red

cover. A reply brief, if any, must have a yellow cover. A color chart is available from the Clerk.

11. A reply brief must be filed in the Clerk's office within 30 days of the receipt of the brief for the respondent or appellee, or actually received by the Clerk one week before argument, whichever is earlier. Rule 25.3.

12. Unless otherwise directed by the Court, counsel on each side will be allowed 30 minutes to argue and only one attorney may argue for each side. Rules 28.3 and 28.4.

Note: Counsel shall become familiar with the revised Rules of Court, effective date May 1, 1997. The Clerk's staff is ready and willing to provide assistance and advice on these procedures and on the application of the Rules to each case. Copies of the Rules are available from the Clerk.

Contact Mrs. Sandy Nelsen (202) 479-3032 for further information. FAX: (202) 479-2959.